85-1399

No. .....

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

EDWARD HINES LUMBER COMPANY OF OREGON,

Petitioner,

v.

LUMBER AND SAWMILL WORKERS LOCAL NO. 2588 and CENTRAL OREGON DISTRICT COUNCIL, LPIW,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Although a labor arbitrator's award is entitled to deference, this Court held in *United Steel Workers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960), that an arbitrator is confined to interpreting and applying the collective bargaining agreement, he is not free to "dispense his own brand of industrial justice" and his award "is legitimate only so long as it draws its essence from the collective bargaining agreement."

1. Whether the majority opinion below properly deferred to an arbitrator's award which invented and imposed a rigid 40 percent subcontracting quota which was never negotiated or agreed to and which is contrary to the company's long-established subcontracting practice.

2. Where in four successive contract negotiations the union sought and failed to gain a restriction on subcontracting and where the contract reserves to the company all management rights not "specifically abridged" by "this Agreement," whether the majority below properly deferred to an arbitration award which expressly rejected reservation of management rights as a basis for deciding the dispute and which imposed a subcontracting quota invented by the arbitrator.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 2

1. Facts 2
2. Proceedings Below 3

REASONS FOR GRANTING THE WRIT 4

1. The issues are of broad and fundamental importance to all union employers 4
2. The arbitrator's imposition of a 40 percent subcontracting quota cannot be said to draw its essence from the collective bargaining agreement because it (1) ignores contract language forbidding the inferential addition of a limitation on subcontracting, (2) imporperly invokes a "balancing test" that cannot be implied from the contract and that is contrary to the management rights clause and (3) conflicts with prior arbitration awards under the contract and finds no basis in the conduct or past practice of the parties 6

a. The *Enterprise Wheel* decision determined that an arbitrator's authority is limited by the collective bargaining agreement 6

b. The majority decision upholding the arbitrator's award is contrary to *Enterprise Wheel* 8

TABLE OF CONTENTS (Cont.)

Page

(1) If permitted to stand, the majority opinion would eliminate any meaningful oversight of arbitral findings 8

(2) The contract expressly forbids "tacit" additions to the contract such as that approved by the majority 12

(3) There is no basis for inferring a "tacit agreement" by the company even if the contract permitted such agreements 13

(a) There is no consent by conduct 13

(b) There is no consent in the contract; the majority's approval of the arbitrator's invented quota based on a vague reference to seniority, recognition and "other" clauses eliminates any meaningful contract restraint on arbitral authority 14

(4) The majority condones the arbitrator's rejection of the management rights clause and improperly approves a "balancing test" which is contrary to that clause 18

3. The majority's opinion conflicts with Fourth Circuit cases decided on similar facts 19

CONCLUSION 20

TABLE OF AUTHORITIES

CASES	Page
Boeing Co. v. *NLRB*, 581 F.2d 793 (9th Cir. 1978)	16
Clinchfield Coal Co. v. *District 28, United Mine Workers*, 736 F.2d 998 (4th Cir. 1984)	4, 19
Clinchfield Coal Co. v. *District 28, United Mine Workers*, 720 F.2d 1365 (4th Cir. 1983)	4, 19
Ethyl Corp. v. *Steelworkers*, 768 F.2d 180 (7th Cir. 1985), *petition for cert. filed* October 18, 1985 (No. 85-670)	5
Illinois Coil Spring Co., 268 NLRB No. 87, 115 LRRM 1065 (1984), aff'd 765 F.2d 175, 119 LRRM 2801 (DC Cir. 1985)	16, 17
Local 670 v. *Kerr-McGee Refining Corp.*, 618 F.2d 657, 659 (10th Cir. 1980)	12
Local Lodge 2040, IAM v. *Serval, Inc.*, 268 F.2d 692 (7th Cir.), *cert den* 361 U.S. 884 (1959)	15
Local Union No. 2812 v. *Missoula White Pine Sash*, 734 F.2d 1384 (9th Cir. 1984)	15
Mistletoe Express Serv. v. *Expressmen's Union*, 566 F.2d 692 (10th Cir. 1977)	12
Monongahela Power Co. v. *IBEW*, 566 F.2d 1196 (4th Cir. 1976)	12
Pacific Motor Trucking Co. v. AMU, 702 F.2d 176 (9th Cir. 1983)	12
United Steelworkers of America v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)	5, 7

TABLE OF AUTHORITIES (Cont.)

STATUTES Page

9 U.S.C. §§ 9, 10 3

28 U.S.C. § 636(b) 4

28 U.S.C. § 1254(1) 1

29 U.S.C. § 185(a) 3

29 U.S.C. § 2106 4

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (App A) is reported at 764 F.2d 631 (9th Cir. 1985). The opinion of the court of appeals denying petition for rehearing (App B) has not yet been reported. (All references to "App" are to the appendix to this petition.)

JURISDICTION

The judgment of the court of appeals was entered and filed on June 25, 1985. Petitioner's petition for rehearing was timely filed on July 25, 1985 and was denied on December 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. *Facts.* Due to severe economic conditions in the lumber industry during the early 1980's, the petitioner ("company") was forced to close a number of its Oregon facilities, including its John Day, Oregon sawmill and related logging operations, which ceased in June 1982. By careful budgeting, the company was able to reopen the John Day sawmill three months later and to provide jobs for 110 employees in the unit represented by respondents ("union"), but the high operating and capital costs of the company's logging operations precluded recall of company loggers. Instead, consistent with a long practice, the company used logging contractors. It is the use of these contract loggers which gave rise to this litigation.

Throughout its long relationship with the union, the company has regularly and consistently subcontracted all phases of the John Day logging operation and has assiduously protected its right to subcontract embodied in the management rights clause of the labor agreement. [1] That clause provides that the company retains all management rights "* * * which have not been specifically abridged, delegated or modified by the Employer under a provision of this Agreement * * *." It is undisputed that no provision in the

[1] The management rights clause provides in full:

> "All rights of management and direction of the business, and the exercise of discretion reasonably related thereto, which have not been specifically abridged, delegated or modified by the Employer under a provision of this Agreem nt are recognized by the Union as being retained by the Employer."

agreement states that subcontracting is prohibited or limited in any way, or even mentions subcontracting.

In the last four consecutive collective bargaining agreement negotiations, spanning a period of over nine years, the union demanded contract language limiting the company's right to subcontract, and in each negotiation the company rejected the union's proposals and successfully preserved its subcontracting rights. During the period since 1977, the union filed at least 11 subcontracting grievances, every one of which was rejected by the company. The union took three of those grievances to arbitration; in all three arbitrations, the company's position was sustained and the grievance denied.

The union invoked the contract grievance procedure to protest the company's decision in the fall of 1982 to use contract loggers and took its grievance to arbitration. The arbitrator upheld the grievance, ruling that because the company's average percentage of contract loggers (as distinguished from company loggers) over the past 11 years was roughly approximated at 40 percent, the company could never again exceed that percentage (App C, pp C-30, C32).

2. *Proceedings Below.* The company filed suit to vacate the arbitration award in the United States District Court for the District of Oregon. The district court had jurisdiction under 29 U.S.C. § 185(a) and 9 U.S.C. §§ 9, 10. In an opinion which recognized the limited judicial role in reviewing arbitral awards and which carefully analyzed this award, the magistrate concluded that, "it cannot be stated that the arbitrator's

award draws its essence from the collective bargaining agreement, and that he did not exceed this authority." (App D, p D-10). On *de novo* review pursuant to 28 U.S.C. § 636(b), the district court adopted the magistrate's decision. (App E) In a divided opinion, a three-judge panel of the United States Court of Appeals for the Ninth Circuit, which had jurisdiction to review the district court's opinion under 29 U.S.C. § 2106, reversed the district court. The majority conceded that the case was a "relatively close" one (App A, p A-10). The dissent found that the arbitrator paid "only lip service" to the contract and the three prior arbitrations and that the award imposed "* * * rigid quotas which the parties had neither bargained nor were likely to have agreed to * * *." "What the arbitrator did here," the dissent concluded, "* * * was simply to dispense his own brand of industrial justice." (App A, p A-13).

REASONS FOR GRANTING THE WRIT

1. The issues are of broad and fundamental importance to all union employers.

The questions raised have far-reaching ramifications in an area plagued by considerable legal uncertainty, as evidenced by the split in the panel below, by the majority's recognition that this is a close case, and by the recent contrary decisions on similar facts in the Fourth Circuit.[2] The degree of deference to arbitra-

[2] These decisions, *Clinchfield Coal* v. *District 28, United Mine Workers*, 720 F.2d 1365 (4th Cir. 1983) and *Clinchfield Coal Co.* v. *District 28 United Mine Workers*, 736 F.2d 998 (4th Cir. 1984), are discussed in Section 3 below.

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tion awards, particularly in the subcontracting area, holds considerable significance for labor-management relations. If employers who have carefully and consistently protected their subcontracting rights for many years at the bargaining table, in grievance and arbitration procedures, and in subcontracting practices, nonetheless remain subject to the financial devastation of an arbitrator's imposition of an artificial quota or other arbitrary subcontracting limitation, the ability of such employers to rationally order their affairs and plan production will suffer a serious setback. Such a principle should not be permitted.

While arbitral awards are entitled to deference from the courts, that deference is emphatically limited, as this Court recognized in its admonition that an arbitrator's award is legitimate "* * * only so long as it draws its essence from the collective bargaining agreement.* * *" *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). *Enterprise Wheel* also forbade the labor arbitrator to "* * * dispense his own brand of industrial justice." 363 US at 597.

While these general principles are useful, they have spawned considerable conflict and inconsistency in the lower courts. The need for precise limits on arbitral authority is particularly acute for fundamental man-

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In contrast to the *Clinchfield* decision, the Seventh Circuit in *Ethyl Corp.* v. *Steelworkers*, 768 F.2d 180 (7th Cir. 1985) reversed a district court's order vacating a labor arbitration award. A petition for certiorari was filed in this case on October 18, 1985 and is currently before the Court. Dkt. 85-670.

agement decisions (as here) involving the direction and possibly the survival of the enterprise. Arbitral reversals of management decisions to subcontract (as here), lease, relocate, or close facilities should be subject to review under standards which allow a company meaningfully to assess its business risks. The majority decision below fails to articulate or observe any manageable standard of review and condones an arbitrator's invention of a fixed subcontracting quota which has no rational basis in the contract and which had never before been observed by the company.

If the majority decision below is permitted to stand, important management decisions such as the subcontracting decision here will be subject to an arbitrator's unbridled power to invent and impose his own arbitrary restrictions. Employers will be subject to the arbitrator's own sense of justice, under the guise of a "balancing test," despite contract language which explicitly requires a different test.

2. The arbitrator's imposition of a 40 percent subcontracting quota cannot be said to draw its essence from the collective bargaining agreement because it (1) ignores contract language forbidding the inferential addition of a limitation on subcontracting, (2) improperly invokes a "balancing test" that cannot be implied from the contract and that is contrary to the management rights clause and (3) conflicts with prior arbitration awards under the contract and finds no basis in the conduct or past practice of the parties.

a. *The Enterprise Wheel decision determined that an arbitrator's authority is limited by the collective bargaining agreement.*

In *Enterprise Wheel* this Court held that there are definite limitations upon the deference that should be

given to an arbitrator's authority. The Court stated:

> "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." 363 US at 597.

Here the contract language that most directly addresses this dispute is the management rights clause, which preserves the company's subcontracting rights unless such rights were "*specifically* abridged, delegated or modified by the Employer under a provision of this Agreement * * *" (App F, pp F-1, F-2), emphasis added). The arbitrator's authority is further confined by the Entire Agreement clause, which provides: "The terms of this Agreement may be supplemented, amended or waived only by mutual agreement in writing executed by the parties hereto" (App F, p F-5) and by the arbitration clause, which provides:

> "The arbitrator shall have no authority to enlarge, diminish, alter or amend the working agreement between the parties and shall confine his decision to interpretation and application of such terms of this Agreement as have been placed in issue by the parties." (App F, p F-4)

Contrary to these limitations on his authority the arbitrator wrote his own subcontracting clause — a rigid 40 percent quota. In spite of the mandate of the

contract that all management rights are reserved unless "specifically abridged" by "this Agreement," the arbitrator referred to such reserved rights as a "theory" and expressly refused to apply this "theory." (App C, p C-19) Instead of applying the contract, the arbitrator referred generally to recognition and seniority clauses, and purported to find an "implied limitation" on subcontracting, based not on any language appearing in these clauses or on any past practice supportable in the record, but on the basis of "an implied covenant in every contract" (App C, p C-29). Such an award clearly does not draw its essence from the collective bargaining agreement.

b. *The majority decision upholding the arbitrator's award is contrary to Enterprise Wheel.*

(1) *If permitted to stand, the majority opinion would eliminate any meaningful oversight of arbitral findings.*

In the name of "past practice" the majority below condones the arbitrator's disregard of the controlling contract language and his invention and imposition of an arbitrary quota. While past practice under a labor contract can legitimately influence the interpretation of that contract, past practice is not an excuse for abdication of judicial review of arbitral awards for consistency with the labor contract. Judicial deference to arbitral awards is subject to limitations; no deference is due to arbitral findings that are without factual basis or to arbitral quotas that contravene the contract and past practice.

The majority opinion states: "The employer had consistently maintained a mix of 60 percent company loggers and 40 percent subcontractors" (App A, p A-3), and from this concludes:

> "* * * the crux of the arbitrator's decision was that the 60-40 historical ratio of company to independent workers *was* the contract; the arbitrator found that the long-standing practice amounted to part of the Agreement. The inference was that a tacit agreement existed between the parties to leave intact the previous pattern.* * *
>
> "[The arbitrator] clearly based his decision in large part on the employer's undisputed historical practice of maintaining a 60-40 ratio as indicated above." (App A, pp A-8, A-9).

Thus, the majority approves the arbitrator's invention of a 40 percent quota based on the arbitrator's finding, also accepted by the majority, of a "practice." But the record shows that the majority's "deferral" to the arbitrator on these issues is nothing short of abdication. All evidence in the record relating to the ratio of subcontractors to employees is set forth in the margin [3] and in Appendix. As this evidence shows, the

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[3] The Union's witness, Ralph Dickinson, testified:

"Q. [by Union's attorney] O.K. As of the time of those negotiations, what was the situation here at the John Day logging operation with respect to subcontractors and company loggers? What was the percentage of the mix?

"A. I'm sorry, Bernie, I couldn't give you a percentage.

"Q. You have no idea?

"A. I couldn't give you a percentage, I'm sorry.

"Q. All right, but, there was a —

"A. There was a mix.

"Q. — mix.

* * * * * *

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60-40 figure represents not a practice, but *an average* — and a rough average at that. It does not represent the ratio that was in effect at any given time, but an overall average which encompasses an 11-year period during which the ratio fluctuated. It is an average that the union's witness could not even approximate, and which the company's witness offered only reluctantly, stressing that it was only an average, that the percent varied, and that it covered a period of 11 years.

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"Q. Was there a mix of subcontractors and company loggers at that time?
"A. Uh huh.
"Q. Was that part of the *status quo?*
"A. Certainly, certainly." (MSJ 101, 110)

A company witness, Jack Young, testified on cross-examination:

"Q. [By Union's attorney] Since 1971, what's been the ratio up until the time you eliminated them between company and subcontractors?
"A. That's varied.
"Q. Well, on the average?
"A. Probably it averaged out around 60 percent, the figure you said earlier [in opening argument].
"Q. Sixty percent company and 40 percent subcontractors?
"A. That's correct.
"Q. Would that have been the average, as far as you know, even before you got here when they were using both?
"A. I don't know. I would doubt that it was that much, or it might have been more. I don't —
"Q. More what?
"A. More contractor. I really don't know.
"Q. But, at least in 1971 that's a fair estimate — 60-40?
"A. Yes. Or that's an average, you know.
"Q. Yes. A fair average estimate.
"A. Yes." (MSJ 240-241)

An average is not a practice. An average is the consequence of a practice. For example, this Court's practice in deciding appeals is to decide each case on its merits. This practice results in an average percentage of affirmances, but that average is not evidence that any decision of this Court is ever influenced by some effort to maintain a quota of affirmances.

Similarly, the mere fact that the company's 11-year estimated average for subcontracting logging work was roughly 40 percent in no way suggests that the company ever observed any subcontracting quota or that any quota ever had the least bearing on subcontracting decisions. On the contrary, the record is uncontradicted that the company's uniform practice in determining whether logging work should be subcontracted was to base the decision solely and exclusively on economics. All subcontracting decisions were "* * * based on economics, considering the factors of manpower, availability, expertise, machinery availability in the area, and sometimes even to the point of analyzing which Forest Service sale administrator you were dealing with and who could get along with him better" (MSJ 194). Nothing in the record states or suggests that a 40 percent figure or any other figure was ever used by the company, as a quota or a guideline or in any other way.

The majority's abdication of its reviewing responsibilities under the guise of "past practice" would terminate the company's long-established practice of basing subcontract decisions solely on economic considerations and would substitute the arbitrator's artificial quota

never before observed or considered. Under the 40 percent quota devised and imposed by the arbitrator, the company is required to forego economically attractive subcontracts which it uniformly entered in the past. The company's use of subcontractors fluctuated over the years, but the arbitrator's award would forbid any subcontract which resulted in an excess over the arbitrator's fixed and arbitrary quota. The arbitrator's 40 percent subcontracting quota is nothing more than his own brand of industrial justice.

(2) *The contract expressly forbids "tacit" additions to the contract such as that approved by the majority.*

Respect for arbitral judgments does not protect awards that transgress clear contract prohibitions. [4]

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[4] As stated by the Tenth Circuit in affirming a judgment vacating an arbitration award, "We are not here considering the merits of the award nor did the trial court. Instead it must be determined whether the arbitrator departed from the provisions provided in the labor contract." *Local 640* v. *Kerr-McGee Refining Corp.*, 618 F.2d 657, 659 (10th Cir. 1980). Similarly, the Fourth Circuit observed in *Monongahela Power Co.* v. *IBEW*, 566 F.2d 1196, 1198 (4th Cir. 1976), that, "The powers of an arbitrator are not unlimited. He derives his authority from and is bound by the terms of the contract from which he draws his authority * * *." *Accord, Mistletoe Express Serv.* v. *Expressmen's Union*, 566 F.2d 692, 695 (10th Cir. 1977) ("An arbitration award will not be upheld when it contravenes the express language of the labor contract."); *Pacific Motor Trucking Co.* v. *AMU*, 702 F.2d 176, 177 (9th Cir. 1983) ("An award that conflicts directly with the contract cannot be a 'plausible interpretation'" and must therefore be vacated. "The arbitrator disregarded a specific contract provision to correct what he perceived as an injustice * * *. Because the award conflicts directly with the contract, the court properly vacated the award.").

The management rights clause here requires that any subcontracting restriction be "specifically" set forth in "this Agreement." The capitalized terms, "Agreement," is used in the preamble to the written contract to refer to that written document (App F, p F-1). The "Entire Agreement" clause, also referring to a capitalized "Agreement," provides that "the terms of *this Agreement* may be supplemented, amended or waived only by mutual agreement in writing executed by the parties hereto" (App F, p F-5; emphasis added). The majority opinion shows that the arbitrator directly violated this limitation on his authority. The majority statement that "* * * the arbitrator found that the long standing practice amounted to part of *the Agreement* * * *" (App A, p A-7; emphasis added), shows that the arbitrator supplemented and amended "this Agreement" based solely on an imagined "practice" and without the "mutual agreement in writing" required by the Entire Agreement clause. This clear transgression of an express limitation on the arbitrator's authority is condoned by the majority opinion below, contrary to the teaching of *Enterprise Wheel.*

(3) *There is no basis for inferring a "tacit agreement" by the company even if the contract permitted such agreements.*

(a) *There is no consent by conduct.*

There can be no tacit agreement without some form of company consent to a limit on its subcontracting rights. The majority apparently assumes that the company's consent is implied by its conduct. Not only is such an implied agreement forbidden by the contract,

but also nothing in the record remotely supports such a consent by conduct. Had the company acquiesced in one or more of the union subcontracting grievances or demands or had there been some evidence that the company attempted to keep within some quota of logging subcontracts, there might be a basis for inferring company consent. But here there is no such evidence. On the contrary, the record shows that the union submitted at least 11 grievances protesting subcontracting decisions and that the company unyieldingly and successfully rejected each and every one of them; that the company categorically rejected every union bargaining proposal to limit subcontracting; that the company categorically prevailed in all prior subcontracting arbitrations; and that throughout its relationship with the union the company's subcontracting decisions were based not on union demands, not on quotas, but simply on the economics of the particular subcontract. This evidence allows no inference of any consent by the company. On the contrary, the company's unrestrained exercise of its unrestricted subcontracting authority shows that it has preserved that authority throughout its relationship with the union.

(b) *There is no consent in the contract; the majority's approval of the arbitrator's invented quota based on a vague reference to seniority, recognition and "other" clauses, eliminates any meaningful contract restraint on arbitral authority.*

The majority states that the arbitrator found an implied covenant that the petitioner would not seriously erode the bargaining unit and that this covenant de-

rives from the seniority, recognition, wage and union security clauses (App A, p A-9). But the arbitrator only referred generally to "recognition, seniority and other provisions" and not to the specific recognition, seniority or other clauses in this contract (App C, p C-18; App F, pp F-1-F-5). Neither the arbitrator nor the majority below identified any specific language of the seniority or recognition clauses as a basis for writing a quota into the contract.

In prior decisions the court below has recognized that seniority clauses cannot provide a basis for an implied covenant not to diminish the size of the bargaining unit. *Local Union No. 2812* v. *Missoula White Pine Sash*, 734 F.2d 1384 (9th Cir. 1984), held that a seniority clause does not limit the employer's right to discharge or "* * * to make good faith, economic decisions concerning the size of its work force * * *." 734 F.2d at 1386. Quoting with approval from the Seventh Circuit, the court below said in *Missoula White Pine Sash*:

> " 'Seniority rights depend on an employer/employee relationship; they do not guarantee such a relationship but merely define the rights of an employee when that status is in existence, and the right of seniority is not inconsistent with the right of an employer to discharge its employee.' " 734 F.2d at 1387, quoting *Local Lodge 2040, IAM* v. *Servel, Inc.*, 268 F.2d 692, 698 (7th Cir.), *cert den* 361 US 884 (1959).

Contrary to *Missouri White Pine Sash*, the decision below condones the misapplication of a seniority clause as a subcontracting restriction. While an arbitrator is not necessarily strictly bound by court decisions, here

the contract required the arbitrator to find a "specific" prohibition of subcontracting in "this Agreement." Court precedent recognizing that seniority clauses cannot, even by implication, limit an employer's right to reduce its work force, demonstrates the irrationality of an arbitral award holding a seniority clause to "specificaly abridge" subcontracting rights.

This failing of the award is also demonstrated by the language of the contract seniority clause (App F, pp F-2, F-3). That clause imposes no express or implied restraint on loss of unit work and, quite to the contrary, specifically contemplates such losses as occurred here, and provides a mechanism for distributing the remaining jobs among unit employees. By no rational reading of this clause does it "specifically abridge" the company's subcontracting rights, as required by the management rights clause.

Equally errant is the majority's approval of the recognition clause of the contract (App F, p F-1) as a basis for the arbitrator's invented quota. The court below has acknowledged that a recognition clause may not "* * * be extended by implication to become a jurisdictional clause, reserving exclusively for the Union all 'functions' which might normally have been performed by those 'people' [to whom the recognition clause applies]." *Boeing Co.* v. *NLRB*, 581 F.2d 793, 796 (9th Cir. 1978). The rule of the National Labor Relations Board, approved by the D. C. Circuit, is the same:

> "Language recognizing the Union as the bargaining agent 'for all production and maintenance

> employees in the Company's plant at Milwaukee, Wisconsin,' does not state that the functions that the unit performs must remain in Milwaukee. No doubt parties could draft such a clause; indeed, work-preservation clauses are commonplace. It is not for the Board, however, to create an implied work preservation clause in every American labor agreement based on wage and benefits or recognition provisions, and we expressly decline to do so."

Illinois Coil Spring Co., 268 NLRB No. 87, 115 LRRM 1065, 1067 (1984), aff'd 765 F.2d 175, 119 LRRM 2801 (DC Cir. 1985). The unwillingness of the courts and the NLRB to find, even by implication, a right of work preservation in recognition clauses, confirms that there can be no rational basis for concluding, as required under the management rights clause of this contract, that a recognition clause "specifically abridges" the company's right to subcontract.

Nothing in the recognition clause here suggests any rational basis for a limit on subcontracting rights. The clause contains no hint of a limit on subcontracting and continues to apply to all unit employees, including all company loggers who were recalled in September 1982 and all company loggers not recalled; the entire group continues to be represented by this union, as provided in the recognition clause. (App F, p F-1). There is no rational basis for implying from these clauses or from any other clause the specific abridgement of subcontracting rights required by this contract. The majority's "deferral" to the arbitrator's irrational application of these clauses is an abdication of the judicial obligations imposed by *Enterprise Wheel*.

(4) *The majority condones the arbitrator's rejection of the management rights clause and improperly approves a "balancing test" which is contrary to that clause.*

Of course, on subjects where the contract is silent an arbitrator is free to use reasonable rules of construction to interpret and apply the agreement. However, when the parties direct the arbitrator to use a particular rule of construction — as is the case here — he is not free to ignore the rule or to apply a different rule which he may prefer; nor is a court free to look the other way when an arbitrator ignores the clear mandate of the contract.

Here, the management rights clause applies directly to this controversy — neither the arbitrator nor the majority asserted otherwise. Yet, by the majority's concession, the arbitrator rejected the very rule which the contract requires him to apply: "The arbitrator considered the reserved rights theory of management, but rejected it after reviewing the applicable authorities" (App A, p A-9). The arbitrator's rejection of the "reserved rights theory of management," conceded by the majority, is a clear rejection of the management rights clause which the parties directed the arbitrator to apply and which is the controlling language of the agreement in this case. The arbitrator's disregard of the mandate of the contract and his substitution of his own balancing test shows that he ignored the contract, exceeded his authority, and instead dispensed his own brand of industrial justice.

3. The majority's opinion conflicts with Fourth Circuit cases decided on similar facts.

Clinchfield Co. v. *District 28, United Mine Workers*, 720 F.2d 1365 (4th Cir. 1983) and *Clinchfield Co.* v. *District 28, United Mine Workers*, 736 F.2d 998 (4th Cir. 1984), involved arbitration awards holding that the company violated a labor contract by licensing out coal mining operations. The Fourth Circuit affirmed district court decisions vacating the arbitration awards on the ground, among others, that the arbitrator only stated the issue under the controlling contract clause, but, "* * * fail[ed] to discuss critical contract terminology * * *." 720 F.2d at 1369. Contrary to the Fourth Circuit, the Ninth Circuit here disregards an identical flaw in this arbitration award — the critical management rights clause is mentioned by the arbitrator here only in his recitation of the company's arguments (App C, p C-14). His utter failure to discuss the application of that clause to the controversy is a shortcoming that would have been fatal in the Fourth Circuit and should have been in the Ninth.

Another reason that the *Clinchfield* awards failed is that they were inconsistent with other arbitration awards under the same clause, just as the award here conflicts with the three prior subcontracting awards, all upholding the company's right to subcontract.

This conflict between the majority opinion below and the Fourth Circuit's *Clinchfield* decisions further demonstrates the need for review of this case and for development by this Court of the standards for review

of arbitral awards, particularly awards which involve subcontracts, plant closures, and other fundamental management decisions.

CONCLUSION

This petition for a writ of certiorari should be issued to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this matter.

Respectfully submitted,

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Clerk, U.S. Court of Appeals

United States
COURT OF APPEALS
for the Ninth Circuit

EDWARD HINES LUMBER COMPANY OF OREGON,	)	
Plaintiff-Appellee,	)	No. 84-3503
	)	DC No.
v.	)	CV 83-780
LUMBER AND SAWMILL WORKERS LOCAL No. 2588 and CENTRAL OREGON DISTRICT COUNCIL, LPIW,	)	*OPINION*
Defendants-Appellants.	)	

Appeal from the United States District Court for the District of Oregon
OWEN M. PANNER, District Judge, Presiding

Argued and Submitted September 7, 1984
Portland, Oregon

Before: KILKENNY and SCHROEDER, Circuit Judges, and AGUILAR *, District Judge

AGUILAR, District Judge:

* The Honorable Robert P. Aguilar, United States District Judge for the Northern District of California, sitting by designation.

INTRODUCTION

Appellee, Edward Hines Lumber Company of Oregon, (hereafter "the Employer") originally filed this action in the United States District Court for the District of Oregon seeking to vacate an arbitration award in favor of appellants, Lumber and Sawmill Workers Union Local 2588 and the Central Oregon District Council, LPIW (hereafter "the Union"). The Union counterclaimed for the award's confirmation.

On December 12, 1983, the district court granted summary judgment for the employer and vacated the arbitration award.

The union's appeal seeks reversal of the district court's decision and reinstatement of the arbitrator's award. The union argues that the arbitrator did not exceed his authority in ruling that there were limitations on the employer's right to subcontract bargaining unit work.

We agree with the union's position. Accordingly, we reverse the district court decision and confirm the arbitrator's award.

FACTS

The facts are essentially undisputed. The employer operates several facilities and related logging operations near John Day, Oregon. The underlying arbitration took place pursuant to a Collective Bargaining Agreement (hereafter "the Agreement") between the union and the employer covering a sawmill, veneer

plant, planing mill, and logging operation. The primary issue for determination was the employer's decision to subcontract logging work. The Agreement itself contained no express provision regarding subcontracting.

The employer's logging had been traditionally performed partly by its employees and partly by subcontractors. Subcontracting had occurred quite regularly over many years and continued throughout the time covering the Agreement (a three-year agreement beginning August 13, 1981). The employer had consistently maintained a mix of 60% company loggers and 40% subcontractors. The union had been generally displeased with subcontracting in the past and had attempted to secure limits on the employer's subcontracting, (including its complete abolition) either through contract negotiations or by arbitrators' decisions, to no avail. The union had continually argued that the existing provisions of the Agreement constituted a limitation on the employer's right to subcontract bargaining unit work. The employer contended that it had an unlimited right to subcontract, by virtue of the management rights clause in the Agreement. [1]

During the economic recession of 1979-1982 when logging and other similar industries were heavily hit,

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[1] The management rights clause provides: "All rights of management and direction of the business, and the exercise of discretion reasonably related thereto, which have not been specifically abridged, delegated or modified by the Employer under a provision of this Agreement are recognized by the Union as being retained by the Employer."

the employer incurred losses which led to the closing of the John Day sawmill and related logging operations.

For a variety of reasons motivated by those serious economic considerations, the employer decided that the mill could not be opened under the proposed budget unless the logging operations were contracted. In September 1982 the employer reopened and eliminated the logging crews represented by the union and replaced them with unrepresented subcontractors. The union immediately filed a written grievance and, after exhaustion of grievance procedures, the matter was scheduled for arbitration. The union submits that the arbitrator was faced with an entirely new issue, i.e., whether the employer could permanently replace 76 bargaining unit employees while utilizing non-bargaining unit personnel to perform their jobs. Each party had a full opportunity to present evidence at the arbitration and voluminous post-hearing briefs were filed.

The union received a favorable arbitration award. The arbitrator recognized the employer's right to subcontract, but found an implied limitation on that right. The arbitration award stated that the historical proportion of 60% company workers and 40% subcontractors for logging work had become inextricably part of the contract and the agreement had been negotiated within that context; thus, the employer was limited to subcontracting no more than 40% of its logging operations. The arbitrator held that the employer's right was limited by the implied covenant found in

every contract together with the recognition, wages, union security, and other clauses in the Agreement.

The employer moved for vacation of the award and the district court concluded that "it cannot be stated that the arbitrator's award draws its essence from the collective bargaining agreement," and vacated the award. The district court acknowledged that the arbitrator discussed past conduct of the parties in reaching his decision, but stated that the arbitrator failed to consider past practices, past negotiations of a disputed clause, and past arbitral decisions, and entered summary judgment in favor of the employer.

DISCUSSION

The question before this Court is whether or not the district court properly vacated the arbitrator's decision and set aside the award when it granted summary judgment in favor of the employer.

A trial court's granting of summary judgment is reviewed *de novo*. *Lojek* v. *Thomas*, 716 F.2d 675, 677 (9th Cir. 1983).

One of the basic principles governing court review of arbitrator's awards is the narrowness of the court's role. Thus, courts should not reexamine the merits of the underlying grievances, nor should they overrule an arbitrator because they disagree with the arbitrator's interpretation of the contract. *Broadway Cab Co-op., Inc.* v. *Teamsters & Chauffeurs Local 281*, 710 F.2d 1379, 1382 (9th Cir. 1983).

In *Broadway Cab Co-op, supra,* the court stated:

> Under the *Steelworkers Trilogy,* a district court ordinarily engages in only a very limited review of an arbitrator's decision. *See United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). An award will be upheld provided it "draws its essence from the collective bargaining agreement," *id.* at 597, 80 S.Ct. at 1361; that is, as long as the arbitrator looks to the words of the contract and to the conduct of the parties, . . ."
>
> *Id.* at 1382.

An arbitrator's award is thus entitled to deference in the courts, and the court's review of an award is quite circumscribed.

The preceding quoted passage highlights another fundamental principle regarding arbitrator's awards. The award must be drawn essentially from the collective bargaining agreement. In *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960), the Supreme Court stated:

> He [an arbitrator] may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

And in *W. R. Grace and Co.* v. *Local Union 759*, — U.S. —, 103 S.Ct. 2177, 2182 (1983) the Court held that unless an arbitrator's decision does not draw its essence from the collective bargaining agreement "a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous."

In *Pacific Motor Trucking v. Automotive Machinists*, 702 F.2d 176 (9th Cir. 1983), this Court stated: "We enforce an arbitration award if it represents a "plausible interpretation of the contract in the context of the parties' conduct." *Id.* at 177, quoting *Holly Sugar Corp.* v. *Distillery, Rectifying, Wine & Allied Workers International Union*, 412 F.2d 899, 903 (9th Cir. 1969)."

The employer argues that the arbitrator here exceeded his authority and extended the matters in the award beyond the provisions contained in the Agreement. The employer contends that the management rights clause permits the employer to subcontract absolutely unless a provision of the agreement specifically allows otherwise. Since none did so, the employer asserts that the management rights clause is controlling and was erroneously disregarded by the arbitrator.

As the union argued at the hearing, the crux of the arbitrator's decision was that the 60-40 historical ratio of company to independent workers *was* the contract; the arbitrator found that the long standing practice amounted to part of the Agreement. The inference was

that a tacit agreement existed between the parties to leave intact the previous pattern.

No express provision prohibiting subcontracting exists in the Agreement. The arbitrator thus resorted to a balancing test to weigh the union's interests as specifically set forth in certain clauses of the Agreement with the employer's interests in subcontracting to the fullest extent possible. The balancing test is appropriate when an agreement is silent on the subcontracting issue. *See e.g., Sears, Roebuck & Co.* v. *Teamsters Local Union No. 243*, 683 F.2d 154, 156 (6th Cir. 1982), *cert. denied*, 103 S.Ct. 1274 (1983).

Moreover, despite the district court's comment that the award failed to consider past practices, past negotiations of a disputed clause, and past arbitral decisions, the record shows that the arbitrator in fact did cover those items.

To consider whether an award drew its essence from the collective bargaining agreement, the court must ensure that the arbitrator looked to the words of the contract and to the conduct of the parties. *Riverboat Casino, Inc.* v. *Local Joint Executive Board of Las Vegas*, 578 F.2d 250, 251 (9th Cir. 1978). *Accord, Broadway Cab, supra.*

In the case at bar the arbitrator did so. He examined the past practices of the parties. He noted that the employer had never before used subcontractors to the complete exclusion of bargaining unit loggers. He clearly based his decision in large part on the employer's undisputed historical practice of maintaining

a 60-40 ratio as indicated above. He discussed in his award past arbitral decisions favoring the employer and past negotiations, but found them to be distinguishable since none before had involved a permanent loss of so many bargaining unit positions. Additionally, the arbitrator found that other clauses, such as wages, recognition, union security, and seniority, taken together, constituted an implied covenant that the employer would not seriously erode the bargaining unit by subcontracting. The arbitrator considered the reserved rights theory of management, but rejected it after reviewing the applicable authorities.

The employer emphasizes the union's many past attempts in arbitrations and at the bargaining table to gain limits on the employer's subcontracting and states that the arbitrator rejected this history erroneously. However, the fact that the union had never made inroads at eliminating subcontracting, or having the employer formally concede to limit it, does not mean that no limits at all were implied or understood by the parties.

As the union points out, and as discussed above, the arbitrator thoroughly considered all relevant evidence presented to him. A review of the arbitrator's decision reveals that he carefully analyzed the common law of the industry, looked at past arbitration decisions, and took into account economic considerations.

The district court appears to have disagreed with the conclusions and interpretations of the arbitrator. Given the policy of deferral to arbitration awards, and

the narrow standard to be applied permitting only of limited review by the court, this Court reverses the district court's decision. This Court after review cannot say that the arbitrator's award was not a plausible interpretation of the agreement in the light of the parties' conduct. Thus, the district court erred in ruling that the arbitrator exceeded his authority.

Our decision is fully consistent with the Fourth Circuit's decisions in *Clinchfield Coal* v. *District 28, United Mine Workers*, 720 F.2d 1365 (4th Cir. 1983), and *Clinchfield Coal Co.* v. *District 28, United Mine Workers*, 736 F.2d 998 (4th Cir. 1984). In those cases, the collective bargaining agreement permitted subcontracting of coal mining operations unless it caused the layoff of employees. The Fourth Circuit held in those cases that the layoffs did not violate the contract because the subcontracting did not cause the layoffs.

Because this question was relatively close, the Court denies attorney's fees to the union on appeal.

REVERSED.

FILED
JUN 25 1985
PHILLIP B. WINBERRY
Clerk, U.S. Court of Appeals

KILKENNY, Circuit Judge, dissenting:

I respectfully dissent. The majority concludes that the district court improperly substituted its own judgment for that of the arbitrator in vacating the arbitrator's award in favor of the Union. I disagree, for the reason that the majority's disposition misses what I perceive to be the critical question presented by this appeal: When management's decision to subcontract work does not violate the express terms of a collective bargaining agreement and causes no unemployment among bargaining unit workers, should an arbitration award based upon a disregarding of these facts be upheld? I submit that it should not.

The undisputed facts are that the collective bargaining agreement contains a broadly worded managment rights clause which clearly grants management the discretion to decide all matters not specifically contained in the agreement. There is nothing in the agreement concerning limitations on management's right to subcontract work. This is consistent with the history of the parties' labor-management relations, since management had always subcontracted some work. Indeed, on three occasions the Union took disputes arising out of such subcontracting practices to arbitration, and on all three occasions management's right to subcontract was upheld.

I believe the reasoning contained in a brace of Fourth Circuit cases, factually similar to this one, to be highly persuasive. In *Clinchfield Coal Co.* v. *District 28, United Mine Workers*, 720 F.2d 1365 (CA 4 1983) (*Clinchfield I*) and *Clinchfield Coal Co.* v. *District 28, United Mine Workers*, 736 F.2d 998 (CA 4 1984) (*Clinchfield II*), the court upheld the district court's decision to vacate an arbitrator's award in favor of laid-off Union miners on the ground that the subcontracting of mining operations *did not cause the unemployment complained of* and therefore did not violate the collective bargaining agreement, which contained a no-subcontracting clause. 720 F.2d at 1369-70; 736 F.2d at 999. *But see George Day Constr. Co.* v. *Local 354, United Bhd. of Carpenters and Joiners*, 722 F.2d 1471, 1480 (CA 9 1984) (employer's unilateral act of withdrawing from multi-employer bargaining unit and subcontracting projects to nonunion workers violated agreement's no-subcontracting clause).[1]

Such is precisely the situation presented by this appeal: Management's decision to subcontract work was made based on purely economic considerations. The Union employees who claim to have been affected were already, and had been for some time, laid-off. No Union workers were added to the unemployment rolls by management's decision, and those already laid-off

[1] Implicit in the court's holding in that case were the apparent beliefs that the employer had not acted in good faith, and that the subcontracting prohibition "lay at the very heart of the employer-employee relationship" and could not be unilaterally disregarded. 722 F.2d at 1480. No such problems are present here.

were not placed in a worse position thereby. Parenthetically, it should be noted that both the *Clinchfield* and *George Day* cases involved agreements with explicit, no-subcontracting clauses; no such clause exists in this case.

While it is not our place to reweigh the merits of the arbitration dispute, we have an obligation to determine whether the arbitration award "draws its essence" from the agreement, *i.e.*, the arbitrator must look to the words of the contract and to the conduct of the parties. *Broadway Cab Co-op., Inc.* v. *Local 281, Int'l Bhd. of Teamsters*, 710 F.2d 1379. 1382 (CA 9 1983). Where an arbitrator pays only lip service to the express terms of an agreement as well as to the results of three prior arbitrations involving the same parties and similar claims, while sumultaneously imposing rigid quotas which the parties had neither bargained for nor were likely to have agreed to, it cannot be seriously maintained that his award draws its essence from the agreement. What the arbitrator did here was simply to dispense his own brand of industrial justice. *See Pacific Motor Trucking Co.* v. *Automotive Machinists Union*, 702 F.2d 176, 177 (CA 9 1983).

I would adopt the holdings of *Clinchfield I* and *II* as the law of this Circuit, and would vacate the arbitrator's award and affirm the district court.

FILED
DEC 04 1985
Clerk, U.S. Court of Appeals

United States
COURT OF APPEALS
for the Ninth Circuit

EDWARD HINES LUMBER COMPANY OF OREGON, *Plaintiff-Appellee,*	)	No. 84-3503
v.	)	DC # C 83-780 (District of Oregon)
LUMBER AND SAWMILL WORKERS LOCAL No. 2588 and CENTRAL OREGON DISTRICT COUNCIL, LPIW, *Defendants-Appellants.*	)	*ORDER*

Before: KILKENNY and SCHROEDER, Circuit Judges, and AGUILAR *, District Judge

A majority of the panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

* The Honorable Robert P. Aguilar, United States District Judge for the Northern District of California, sitting by designation.

C-1

RECEIVED
MAY 9 1983
JOLLES, SOKOL & BERNSTEIN, P.C.

IN THE MATTER OF ARBITRATION BETWEEN EDWARD HINES LUMBER COMPANY, GRANT COUNTY DIVISION, JOHN DAY OPERATIONS, *Company,* and LUMBER AND SAWMILL WORKERS UNION, LOCAL No. 2588, *Union.*	ARBITRATOR'S OPINION AND AWARD GRIEVANCE of JIM DANIELS (Subcontracting)

HEARING DATE:	February 17, 1983
HEARING SITE:	Parish Hall St. Elizabeth's Catholic Church John Day, Oregon
POST-HEARING BRIEFS DUE:	Postmarked March 28, 1983
RECORD CLOSED ON RECEIPT OF BRIEFS:	March 30, 1983
ARBITRATOR:	GARY L. AXON 1465 Pinecrest Terrace Ashland, OR 97520 (503) 488-1573
REPRESENTING THE UNION:	BERNARD JOLLES MICHAEL T. GARONE JOLLES, SOKOL and BERNSTEIN, P.C. 721 S.W. Oak Street Portland, OR 97205
REPRESENTING THE COMPANY:	GARRY R. BULLARD CALVIN L. KEITH BULLARD, KORSHOJ, SMITH and JERNSTEDT, P.C. 300 Century Tower 1201 S.W. 12th Avenue Portland, OR 97205

I. STATEMENT OF ISSUE

The parties were unable to agree upon an issue at the arbitration hearing. The Union stated the issue as follows:

> "Did the Employer violate the collective bargaining agreement in September 1982, by unilaterally eliminating the entire logging department during the term of the collective bargaining agreement ? If the answer is yes, what is the appropriate remedy?"

The Company stated the issue as follows:

> "Is there any contract limitation on the Company's right to subcontract logging? Does the Arbitrator possess any contractual authority to imply any such limitation?"

The Arbitrator adopts the Union's statement of the issue as it better states the question(s) to be resolved.

II. RELEVANT CONTRACTUAL PROVISIONS

Article I, Section 1.

> "*Section 1.* This Agreement applies to all employees of the Employer at its John Day, Oregon, sawmill, Mt. Vernon Veneer plant, Company logging, transportation, and Seneca reloading operations in the departments hereinafter set forth, except guards and watchmen, office and clerical employees, leased truck operators at Mt. Vernon Veneer Plant, supervisors and professional employees as defined in the Act."

Article II.

> "The Employer recognizes the Union as the sole

collective bargaining agent for regular full and part-time employees in the bargaining unit described in Article I."

Article III, Section 1.

"*Section 1.* All employees covered by this Agreement shall, as a condition of employment, become members of the Union by the 31st day following their employment or the effective date of this Agreement, whichever is the later, and thereafter remain members of the Union through the tender of the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership in the Union."

Article IV, Section 1.

"*Section 1.* All rights of management and direction of the business, and the exercise of discretion reasonably related thereto, which have not been specifically abridged, delegated, or modified by the Employer under a provision of this Agreement are recognized by the Union as being retained by the Employer."

Article V, Section 1.

"*Section 1.* The Employer has the right to hire any person as an employee and to suspend or discharge employees for just cause."

Article VIII, Section 1 and Section 2.

"*Section 1. General.* This Article relates to workdays, workweeks and work schedules and is not a guarantee that work will be provided.

Section 2. Workweek and Workday. The workweek shall begin on Monday and end on Sunday. Each employee's workday shall be the twenty-four (24) hour period beginning with the start of his regularly assigned shift."

Article X, Section 1.

"*Section 1. Definition.* Seniority of all present and future employees shall commence with the last day of hire. For the purpose of this Agreement, plant seniority shall be defined as continuous service in the operation of the Employer covered by this Agreement. Departmental seniority shall be seniority applied in the specific departments as follows:

GROUP I — Sawmill Operations.

(a) Sawmill Production (including Seneca Reload) operators.
(b) Maintenance Department.
(c) Dry Kiln and Powerhouse Department.

GROUP II — Veneer Operations.

(d) Mt. Vernon Veneer Plant operators.

GROUP III — Logging Operations.

(e) Falling and Bucking Department.
(f) Skidding Department.
(g) Yarding Department.
(h) Road Crew Department.
(i) Loading and Unloading Department.
(j) Logging Department Transportation.
(k) Shop Department.
(l) Salvage Logging Department.

For purposes of this provision, all fallers shall be in the Falling and Bucking Department, all loaders and unloaders shall be in the Loading and Unloading Department, and all green chain employees shall be in the Dry Kiln and Powerhouse Department which shall include green chain, yard, dry kiln, and powerhouse personnel.

In the event of a layoff, those employees who have exhausted departmental seniority will have preference over new hires in all departments. Employees desiring an opportunity for recall under this provision shall sign a recall sheet, giving their telephone number, within forty-eight (48) hours of layoff. Thereafter an employee shall have an opportunity to place his name on such list. Recall shall be on the basis of seniority and qualifications of those on the list. There shall be no interdepartmental bumping."

Article XI, Section 2, Step 4.

"*STEP 4* — In the event the parties are unable to reach a settlement of the grievance at Step 3 and the matter is appealed, the dispute shall be submitted to an impartial arbitrator. In the event mutual agreement cannot be reached on the naming of an impartial arbitrator within ten (10) working days from receipt of written notice of appeal to arbitration, they shall strike names alternately from a panel established under Section 3 hereof, until one (1) name remains, and he shall be the arbitrator. The cost of said arbitration proceedings shall be borne equally by the Employer and the Union except that each party shall pay all expenses incident to its own witnesses, evidence, or copy of any transcript of testimony. The parties shall attempt in good faith to agree upon a joint stipulation of the issue to be decided and the pertinent facts which are not in dispute. The arbitration decision shall be issued within thirty (30) days following the close of the hearing or following receipt of the transcript and briefs, if any. The arbitrator shall have no authority to enlarge, diminish, alter or amend the working

agreement between the parties and shall confine his decision to interpretation and application of such terms of this Agreement as have been placed in issue by the parties."

Article XVIII, Section 1 and Section 2.

"*Section 1. Schedule of Classification and Rates.* Attached hereto as part of this Agreement, and marked Exhibit 'B', 'C', and 'D' are the schedules of job classifications and regular straight-time hourly wage rates to become effective June 1, 1980. Said schedule of rates is mutually acceptable as of this Agreement.

Section 2. Wage and Benefit Closure. Except as otherwise provided herein, the subjects of general wage rate or other economic adjustments and individual classification adjustments are closed to bargaining until May 31, 1983, except that such closure will not bar negotiations on rates of pay for newly established job classifications, or on classifications wherein there has been a substantial change in job content following the date of this Agreement."

Article XX, Section 2.

"*Section 2. Entire Agreement.* This Agreement is in full and final settlement of all issues of collective bargaining and constitutes the sole and entire agreement between the parties. The terms of this Agreement may be supplemented, amended or waived only by mutual agreement in writing executed by the parties hereto."

Article XXI, Section 2.

"*Section 2. Closure.* The parties hereto agree that this collective bargaining agreement concludes and

precludes bargaining for the term thereof on any and all issues of matters subject to bargaining except as otherwise specifically provided herein."

III. FACTS OF CASE

The Company operates a sawmill in John Day, Oregon. In addition, the Company conducted related logging operations which are the basis of this dispute. The Company also engaged the services of contract loggers to log timber for the sawmill. The mix of Company logging and contract logging over the years has been approximately 60% Company and 40% subcontractors. The contract contains no express provision on the subject of subcontracting.

The Company and the lumber industry were in difficult financial times during 1982. The John Day sawmill was closed down in June, 1982. The Company desired to reopen the sawmill. The local managers were instructed to develop a budget which would demonstrate that they could open the mill without losing additional money. The budget ultimately developed by management was predicated upon using the lowest stumpage cost sales and upon minimum logging costs to harvest those sales. The Company concluded that the lowest possible log costs required the exclusive use of contract loggers to harvest the timber.

In September 1982, Jim Daniels, President of Local Union 2588, heard a radio report that the Company intended to eliminate its John Day logging operations. Daniels and Claire Morse for the Union met with Jack

Young, Assistant General Manager, for the Company on September 20, 1982 to discuss the logging issue. The employer's representative affirmed that the Company had decided to reopen the mill and would utilize subcontractors to perform all logging operations which had formerly been performed by members of Local 2588.

The Union representatives handed Mr. Young a grievance at the end of the September 20, 1982 meeting. The grievance charged the Company had "unilaterally eliminated all company jobs from wage classifications negotiated between the company and union and is hiring loggers at less wages and fringe benefits than was negotiated." (Jt. Ex. 2). The impact of the decision to cease Company logging was to eliminate approximately 76 jobs held by Union members. The jobs eliminated were 14 truck drivers, fallers, buckers and 62 members of the woods crew. The grievance sought restitution of all contractual benefits lost by employees as the result of the Company's unilateral decision to use only subcontractors to harvest the timber.

The Company denied the grievance on the grounds that the contract contained no provision which limited the right of the Company to subcontract. The Union appealed the denial of the grievance to arbitration. The issue is now properly before the Arbitrator for a decision.

IV. POSITION OF THE PARTIES

A. The Union

The Union does not deny that there is no contractual provision concerning subcontracting in the present contract. However, it is the position of the Union that "the existing provisions of the agreement create an implied limitation on the employer's ability to subcontract work normally performed by bargaining unit members." (Union Brief p. 8). The Union submits "that subcontracting impairs the integrity of the bargaining unit and may have the effect of reducing the contract to a nullity." (Union Brief p. 8).

The Union maintains that it has consistently taken the position over the years that the contract contains an implied limitation on subcontracting bargaining unit work. The Union takes this position in spite of three previous arbitration awards on subcontracting issues which found in favor of the Company. The Union seeks to distinguish the three prior awards on the grounds that none of the prior awards involved such a serious impact on the bargaining unit.

In *LPIW Local 2588 and Edward Hines Lumber Co.* (June 9, 1980), Arbitrator Joseph Kane found no contract violation when the Company used subcontractors when Union members were laid off for two weeks. The Union argues that Arbitrator Kane found that no work performed by bargaining unit members was taken away by contracting out

logging. Hence, the Union concludes the decision does not control the instant situation where 76 loggers were permanently put out of work by subcontractors.

The Union distinguished the award of Arbitrator Arnold Peterschmidt, *LPIW 2588 and Edward Hines Lumber Co.* (July 11, 1980), on the grounds that he found the Company could contract "some" log hauling work in light of the past practice of using a combination of Company loggers and subcontractors. The Union notes that the arbitrator expressly found the employer's actions did not reduce the size of the bargaining unit or jeopardize it in any way. In the view of the Union, Arbitrator Peterschmidt did not have before him a case where the act of the employer rendered substantial injury to the bargaining unit.

The last decision over this issue was by Arbitrator Ross Runkle in *LPIW 2588 and Edward Hines Lumber Co.* (March 11, 1982) where he found the Company did not violate the contract by putting subcontractors to work three days before utilizing laid off Union members. According to the Union, Arbitrator Runkle was careful not to decide if the employer could go so far as to permanently replace bargaining unit employees with subcontractors. The Union sees the three previous awards as involving a minimal effect on the bargaining unit and employment opportunities. It is the Union's position in "the instant case, the bargaining unit and Company loggers have been dealt a death blow."

The Union characterizes the issue before the Arbitrator where the contract is silent on subcontracting as follows:

> "The union in the instant case merely asks that the arbitrator examine the circumstances of the instant case where all bargaining unit work has been subcontracted, and decide the narrow issue of whether this complete cessation of company logging and hauling is in conformance with the mutual understanding and practices of the parties, as evidenced by the collective bargaining agreement and the undisputed past practice of using a 60-40 mix of company loggers and subcontractors."

The Union poses this rhetorical question to the Arbitrator:

> "If the arbitrator rules in favor of the employer in the instant case, what would stop the employer from subcontracting out all of the production jobs at the John Day sawmill simply because they can get non-union labor to perform at lower cost?"

Therefore, the Union concludes that a finding in favor of the Company would totally eliminate from the Agreement the element of job security despite detailed seniority provisions.

The Union maintains that arbitral authority is not in accord with the employer's position that absent a subcontracting clause there is "absolutely no limit" on its power to subcontract. According to the Union, the Company by signing this Agreement, which is silent about the issue of subcontracting,

still has agreed not to use the power to subcontract "in an unreasonable manner which might reduce the scope of the bargaining unit or avoid the stated terms of the contract." The Union sees the adoption of the employer's claim as reducing the contract "to a nullity with little or no practical value."

The Union grounds its implied limitation theory on several contractual provisions. First, Article I makes the agreement applicable to all employees at Company logging operations. Second, in Article II, the Company recognizes the Union as the sole collective bargaining agent for employees in the unit described in Article I. Third, the Agreement contains a union security provision, an hours-of-labor provision and a seniority provision creating departmental seniority for the woods crew. In the words of counsel for the Union, "By agreeing to this combination of provisions, the employer has agreed that it will not utilize subcontracting in such a manner as to deprive bargaining unit employees of work which they customarily and normally perform." The Union denies that the Company can turn its back on the contractual obligations by using subcontractors "merely to save money."

The Union suggests the Arbitrator use the factors laid out by Elkouri and Elkouri in *How Arbitration Works*, pp. 504-07 in evaluating the propriety of subcontracting. According to the Union, the application of those factors leads to only one valid conclusion that is "The Union should prevail in the

instant case." Further, the Union denies that the failure to negotiate a "no-subcontracting" clause into the contract means the employer can subcontract at will under the existing contract language.

Moreover, the Union claims that "special equities" favor the Union in this case. Specifically, concessions agreed to by the Union in the 1980-83 contract to save the logging operations, complete lack of discussion with the Union prior to the decision to subcontract and "bad faith" on the part of the employer when it had previously indicated to the Union that there was no intent to totally eliminate Company logging.

Finally, the Union contends the Company's "efficiency justification is flawed and unconvincing." According to the Union, the record lacks concrete evidence that Union crews were less efficient than the subcontractors. The Union alleges that employer calculations of savings between $300,000 to $400,000 a year by using subcontractors is unrealistic because the Company never uses all-company crews but a mix of employees and subcontractors. Therefore, the Union submits the failure of the Company to calculate savings on the 60% and 40% mix of loggers effectively rebuts the "efficiency justification" offered by the employer.

The Union seeks as relief restitution to the status quo for the duration of the contract. Specifically, the Union is not seeking 100% of the logging work that is contracted out, but only a return to the

60%-40% mix which prevailed before the Company went exclusively to subcontractors. Further, the Union demands an award of all wages and benefits lost as the result of the Company's actions.

B. The Company

The Company's position is simply stated "that it has the absolute right under the Agreement to subcontract logging operations." The Company relies on the management rights clause which it interprets to be a classic statement of the reserved rights doctrine that "all of those rights not *specifically* yielded or modified under the contract" are retained by the employer. Further, the Company points to Article XX, Section 2, commonly referred to as the "zipper clause" as strong evidence the parties only intended to be bound by those terms expressly provided for in the Agreement. Accordingly, the Company argues the contract must be construed as written with no limitation on the Company's right to subcontract.

Moreover, the Company maintains that Article XI, Section 2, Step 4 supports the premise that the Arbitrator has no authority "to enlarge, diminish, alter or amend the working agreement." According to the Company, the Arbitrator's duty is to apply and interpret the Agreement as written. Here, where the terms are clear the Company urges that the Arbitrator must deny this grievance.

The position of the Company is that it has an absolute right to subcontract. The Company alleges

that it did not abuse its right to contract out logging work. The Company maintains the decision to contract all of the logging work was a last "gasp" effort to open the mill and put people back to work. In the view of the Company this case represents a situation where the employer properly exercised its right to subcontract which resulted in the saving of some mill jobs at the expense of logging jobs. The Company points out that at the time of the decision to subcontract the mill was closed and neither loggers nor millworkers were working.

The Company contends that before reaching the decision to subcontract numerous discussions were held with the Union. The Company denies that the Union received inadequate notice of the decision to subcontract. The Company states that it acted in good faith by taking all other possible steps to make the operation more efficient. In conclusion, the Company submits the decision to eliminate "the logging work was not done simply to make the Company more profitable, but in an effort to survive."

The Company responded to the Union's position that the Arbitrator should imply a limitation on the right to subcontract in three ways. First, arbitral precedent does not support the implication of a limitation upon the Company's right to subcontract. Second, the arbitral precedent interpreting this contract does not support the position of the Union. Third, under the specific language of the Agreement the Arbitrator may not imply a limitation on the Company's right to subcontract.

The Company argues that the recognition clause and the seniority clause do not create a limit on the right to subcontract. According to the Company, the contract clauses relied on by the Union simply fail to support the Union's contentions in this matter. The position of the Company is that the recognition and seniority clauses do not guarantee that there will be logging work.

The alternative argument presented by the Company was that even if you assume there is an implied limitation on the employer's right to subcontract, there are no "equities" which justify upholding the grievance. This premise is based on the contention the Company made the decision to subcontract for valid business concerns. Therefore, the Company concludes it must be found there was no intent to undermine the Union.

V. DISCUSSION

This grievance presents the classic kind of case on subcontracting. There is no specific mention of subcontracting in the Agreement. The right of management to subcontract in the absence of specific contract language has been the subject of many arbitration awards. The numerous published awards cited by counsel in their posthearing briefs amply illustrates the dilemmas faced by arbitrators in this type of case. The line of cases offered by the Company generally hold that there are few, if any, limitations on the ability of the employer to contract out bargaining unit work. On

the other hand, the Union cites considerable authority for the proposition that there are substantial limitations on the right of the Company to subcontract out bargaining unit work even in the absence of specific subcontracting contract language.

The underlying issue in subcontracting is to maintain a proper balance between the employer's legitimate interest in maintaining an efficient and competitive operation and the Union's legitimate interest in protecting the job security and stability of the bargaining unit. *National Distiller's and Chemical Corp.*, 76 LA 286 (1981); *American Standard Inc.*, 52 LA 190; *Kaiser Aluminum and Chemical Corp.*, 43 LA 307.

The earlier reported cases involving subcontracting have generally held that management had the right to subcontract work to independent contractors unless the agreement restricted this right. Elkouri and Elkouri, *How Arbitration Works*, (3rd Ed., 1973), p. 1501. This view was modified by subsequent cases which stated the employer was free to subcontract if it is done in "good faith" to meet a legitimate business need and if the effect on the bargaining unit is minimal. The later view was stated by Arbitrator Feinberg in *National Sugar Refining Co.*, 13 LA 991 (1949) as follows:

> "It is true, of course, that job security, and an opportunity to perform available work, is of concern to a union and that the letting of work to outsiders by an employer may in some instances be said to be a derogation of the basic purposes of their collective bargaining agreement. Neverthe-

> less, it is also true that where the subject has assumed importance in the relations between the parties a provision is generally inserted in the agreement defining their respective rights. It has almost been universally recognized that in the absence of such a provision an employer may, under his customary right to conduct his business efficiently, let work to outside contractors if such letting is done in good faith and without deliberate intent to injure his employees . . ."

The modern cases have further expanded the view expressed by Arbitrator Feinberg where the contract does not specifically address the issue of subcontracting. The essence of this group of cases reflects the viewpoint that the recognition, seniority, wage and other clauses of the contract limit management's rights to subcontract. *Mead Corp.*, 75 LA 667 (1980); *Pacific Car and Foundry Co.*, 69-1 ARB Para. 8381 (1969); *A. D. Julliard Co.*, 21 LA 713 (1953); Elkouri and Elkouri, *How Arbitration Works*, p. 502. A typical rebuttal to the employer's argument that the management rights clause gave it absolute right to subcontract was stated by Arbitrator Nicholas in *Beatrice Foods, Inc.*, 62 LA 926 (1974) as follows:

> "But it must be remembered that the recognition clause requires that the Company maintain a strict sense of obligation to the Union, it being the duly certified and licensed agent for the class of employees named therein. There can be no other construction and interpretation of this provision, for to do so is to make it meaningless and do injury to the integrity of the bargaining unit. In this connection, the essential purpose behind the employees'

effort to organize and bargain collectively is job security. The labor management agreement serves as a statement of intent and a guarantee of purpose. When management turns to persons other than members of the bargaining unit, it must demonstrate good cause. If not, the worker and Union member will be circumvented in his right to work. Such action serves not only to defeat the intent of the parties, but it moots their agreement, leaving it with little, if any, practical value."

This Arbitrator has carefully reviewed the cases cited by counsel for the Company in his brief that the management rights clause allows the Company to subcontract at will, absent a subcontracting clause. In almost all of the cases cited the arbitrator recognized there were limitations on the right to subcontract although these limitations were not present in the particular case at issue. For example, in *Chemed Corp.*, 73 LA 735 (1979) the arbitrator notes that no employee was laid off and company employees could not have completed the job. Further, in *Westmoreland County Housing Authority*, 73 LA 33 (1979), the arbitrator specifically noted that the subcontracting was for a short period of time and in accordance with past practice on the use of subcontractors. It is to be remembered in the instant case before this arbitrator that 76 bargaining unit members were permanently replaced by subcontractors.

Therefore, this Arbitrator must find that the weight of authority is not in accord with the strict interpretation of the management's reserved rights theory asserted by the Company in this case. The better

reasoned awards have always applied some limitations on management's power to contract out work. The implied limitation is consistent with the traditional contract principle that neither party shall do anything which will have the effect of destroying or nullifying the rights of the other party to receive the benefits of the agreement.

Likewise, the recognition, seniority, wage and other clauses in the Agreement do not provide an absolute bar to subcontracting. The Union cannot demand that every job in existence when the parties signed the contract remain constant for the duration of the Agreement regardless of the circumstances. The arbitral authority is strong that within limitations work may be contracted out under appropriate circumstances.

The three previous arbitration awards between the parties over subcontracting do not dispose of the issue before this Arbitrator. The prior arbitration awards did not involve such a serious impact on the bargaining unit as in the instant case. The previous awards dealt with temporary or minor loss of work to contractors. None of the arbitrators was faced with the question of deciding whether or not subcontracting was permissible where the permanent loss of 76 jobs was at stake. Hence, the three arbitration awards between the parties cannot be viewed as binding in this case.

The question still remains whether or not under the facts and circumstances of this case the Company's contracting out violated the collective bargaining agreement. The critical facts in the instant case are the

permanent loss of 76 bargaining unit jobs, the economic difficulties facing the Company in 1982 and the undisputed past practice of using a mix of 60% Company loggers and 40% contract loggers.

Moreover, the bargaining history is undisputed that the Union has sought and failed to achieve through several contract negotiations an express limitation on the right of the Company to subcontract. However, the Union has consistently taken the position that the existing provision of the Agreement create an implied limitation on the employer's ability to subcontract work normally performed by bargaining unit members. It has been the position of the Union that "subcontracting impairs the integrity of the bargaining unit and may have the effect of reducing the contract to a nullity." (Union Brief p. 8).

In *West Virginia Pulp and Paper Co.*, 51 LA 842 (1965) the arbitrator stated:

> "The fact that the Union has attempted and failed to get language in the Agreement limiting the Company's right to subcontract obviously in and of itself does not mean that the Company has an unlimited and completely unrestricted right to subcontract any work it wishes."

I cannot concur with the view of the Company that the failure to obtain "no subcontracting" language automatically means the employer may subcontract at will. If this were the case any union would act at its peril in making a contract proposal to secure greater benefits and protections for the membership. Hence, this Arbi-

trator must find that the unsuccessful attempt to secure subcontracting language does not prevent an inquiry into the implied obligation not to contract work out which has the effect of doing serious injury to the bargaining unit.

The traditional factors which have evolved to evaluate the propriety of subcontracting are summarized in *How Arbitration Works*, supra p. 504-507 as follows:

" 1. Past Practice. Whether the company has subcontracted work in the past.

2. Justification. Whether subcontracting is done for reasons such as economy, maintenance of secondary sources for production and manpower aid, augmenting the regular work force, plant security measures, or other sound business reasons.

3. Effect on the union or bargaining unit. Whether subcontracting is being used as a method of discriminating against the union and/or whether it substantially prejudices the status and integrity of the bargaining unit.

4. Effect on unit employees. Whether members of the bargaining unit are discriminated against, displaced, deprived of jobs previously available to them, or are laid off by reason of the subcontract. Subcontracting may be justified by other considerations even where layoffs will result. Moreover, arbitrators have considered whether layoffs could be anticipated, saying that subcontracting is to be judged by foresight rather than hindsight. Another factor in judging subcontracting is whether unit employees lose regular or over-

time earnings, but loss of overtime often has not been a weighty factor where the agreement did not contain any overtime guarantee.

5. Type of work involved. Whether it is work which is normally done by unit employees, or work which is frequently the subject of subcontracting in the particular industry, or work which is of a 'marginal' or 'incidental' nature.

6. Availability of properly qualified employees. Whether the skills possessed by available members of the bargaining unit are sufficient to perform the work.

7. Availability of equipment and facilities. Whether necessary equipment and facilities are presently available or can be economically purchased.

8. Regularity of subcontracting. Whether the particular work is frequently or only intermittently subcontracted. In one case the arbitrator pointed out that the subcontracting had not been so regular in amount or type of work that additional places could have been made available to permanent employees within the bargaining unit.

9. Duration of subcontracted work. Whether the work is subcontracted for a temporary or limited period, or for a permanent or indefinite period. Even where it is permanent, however, the harm may be outweighed by the justifications for the subcontracting.

10. Unusual circumstances involved. Whether the action is necessitated by an emergency, some urgent need, or a time limit for getting

the work done. Also, the subcontracting may be justified because a 'special job' is involved, or because it is necessitated by a strike or other such situation.

11. History of negotiations on the right to subcontract. Whether management's right to subcontract has been the subject of contract negotiations. Arbitrators have pointed to the union's unsuccessful attempt to negotiate a restriction on subcontracting. However, it has been emphasized that while this factor may support a claim to considerable latitude in subcontracting it cannot imply that there is no restriction at all, for parties may try to solidify or expand existing rights through bargaining."

The text of an address by Arbitrator Sinicropi on the subject of frequently mentioned guidelines used by arbitrators in evaluating labor agreements that do not contain a subcontracting clause contains a similar list. See *National Academy of Arbitrators*, Labor Relations Yearbook, 1979 (BNA), p. 97.

The application of the criteria to the instant case reveals the following information.

1. *Past Practice* — The past practice has always been to use an approximate mix of Company loggers 60% and contractors 40%. It has never been the practice to use all contractors to the complete exclusion of unit members.

2. *Justification* — The Company contends that the subcontracting was made solely for eco-

nomic reasons. The termination of 76 regular employees and hiring of subcontractors to avoid the payment of contracted labor rates in the opinion of this arbitrator is not justifiable.

3. *Effect on the Bargaining Unit* — The bargaining unit has been dealt a serious blow, and the status and integrity of the unit have been seriously undermined. If the subcontracting went to the extent sought by the employer, the contract would become a nullity and the whole purpose of the contractual relationship abrogated.

4. *Effect on Unit Employees* — The permanent loss of 76 unit jobs has resulted from the Company's action. It is undenied that the replacement of unit employees with subcontractors was intended to be permanent.

5. *Type of Work Involved* — In this situation, it is clear that the type of work in question has normally been done by bargaining unit employees. The logging work was not marginal or incidental to the tasks performed by this group of employees. The work at stake went to the essence of the tasks being performed by the grievants. However, it must be noted that the logging work performed by the unit employees averaged only 60% of the total logging performed by the Company.

6. *Availability of Properly Qualified Employees* — The qualifications and availability of the employees to perform the work in question are not disputed.

7. *Availability of Equipment* —The employer alleged its logging equipment was "poor, and going down hill." Further, the Company alleged it did not have the capital to repair and replace the equipment. The Arbitrator must reject this claim of the Company for the following reasons. First, the Company voluntarily sold some of its equipment at an earlier auction. Second, the Company repaired some of the equipment and leased it to the subcontractors who used the equipment to perform the logging work. Therefore, in light of these facts the Arbitrator is unpersuaded that the equipment was inoperable to the point of justifying the termination of 76 jobs and letting the work to subcontractors.

8. *Regularity of Subcontracting* — There is no doubt that the Company regularly subcontracted logging work. However, it was the undisputed practice that contractors did approximately 40% of the work with unit employees doing the rest. Never in the past has one group operated to the complete and total exclusion of the other.

9. *Duration of the Subcontracted Work* — The subcontracting by the Company was unques-

tionably intended to be permanent. This factor gives no help to the Company's position.

10. *History of Negotiations* — The failure of the Union to obtain specific contract language does not automatically grant the Company an unlimited and unrestricted right to subcontract out work regularly performed by bargaining unit people during the term of the Agreement.

11. *Unusual Circumstances* — The unusual circumstance and perhaps the strongest in the Company's favor is the fact that the mill reopened after the decision to subcontract the logging operation was made. According to the Company, the reopening of the mill put approximately 110 employees, all Union members back to work. The Company contends the mill would not have reopened but for the contracting of all logging work in order to run the mill as budgeted.

    The difficulty with this position is that it would allow a budget, unilaterally established by the Company, to control the validity of the negotiated agreement. The bottom line being the Company could by manipulating the budget render the collective bargaining agreement meaningless. Specifically, as in this case by setting a budget for operation of the mill based on the premise that use of Company loggers would go over budget and therefore they

> should be totally replaced with contractors. This logic carried one step further would allow the Company to set a budget for the operation of the mill and then conclude it could operate the mill cheaper by subcontracting. Hence, justifying the termination and replacement of Union employees with contractors. The position argued for by the Company is not in accord with established contractual interpretation.

The Arbitrator does not believe that by upholding the Union in this particular case, I would be adding to the Agreement as alleged by the Company. The principles of protecting the job security objectives of the recognition, seniority and other provisions of the applicable contracts have been fully established in the current period of labor-management arbitration. Arbitrator Cocalis in Continental Tennessee Lines, Inc., 72 LA 619 (1979) framed the issue in subcontracting cases as follows:

> "When a three year employment contract specifies hours, wages, and other benefits, reserves the employer's right to abolish the job and otherwise operate and conduct its business, would a reasonable man about to enter into that agreement understand that the Company, for economic reasons, can furlough him in favor of another who will do the work at less pay ?"

The answer to this question must be "no" as any other answer would frustrate the very object and purpose of the contract itself. In other words, such an implied limi-

tation is consistent "with the implied covenant in every contract that neither party shall do anything which shall have the effect of destroying or injuring the rights of the other party to receive the fruits of the contract." *Bendix Corporation*, 41 LA 905.

This Arbitrator in the instant case is deciding the narrow issue of whether the complete cessation of Company logging under the facts and circumstances of this case violate the mutual understanding and practices between the parties. This award is not to be taken as a blanket prohibition against subcontracting. The crucial fact is that 76 unit employees were permanently replaced by subcontractors which had the effect of seriously weakening the bargaining unit or an important part of it during the term of a valid collective bargaining agreement.

The formulation of a remedy is best guided by the principles enunciated by Arbitrator Carlton Snow in *LPIW Local 2801 and Louisiana-Pacific Corporation* (Unpublished Award Dated July 7, 1979) where he stated:

> "In Article 1 of the collective bargaining agreement, the Company recognized the Union as the 'sole collective bargaining agent for all employees in its Oroville, California, operation, except watchmen, supervisors and office employees.' The Employer also agreed to a 'union security' provision, an 'hours of labor' clause, a 'seniority' provision and wage rates. By agreeing to this combination of provisions, the Employer agreed that under most circumstances work associated with produc-

tion of lumber at the Oroville facility would be done by those bargaining-unit employees whose wages and conditions of employment had been determined by the contract.

In effect, what the parties accomplished with those contractual provisions was equilibrium, that is, a balance of the Union's concern with job security and the Employer's need to achieve production in the most efficient manner. Implicit in those contractual provisions is an unstated assumption that the Employer will not transfer work normally performed by members of the bargaining unit to non-bargaining-unit members. To do so would undermine the theme of job security inherent in Articles 1, 2, 10, 11 and 15 of the collective bargaining agreement. In other words, a fundamental purpose of the contract between the parties is to provide a state of equilibrium for interdependent elements of this particular company. A key element of that interdependence is promoting sufficient managerial flexibility for the Employer to operate with maximum efficiency. Balanced against that element is an important quest for job security by bargaining-unit members."

The "state of equilibrium" in the instant case is the restoration of the average mix of using 60% Company loggers and 40% contract loggers for the duration of the current contract. The parties did not present evidence on the remedy issue and agreed to leave the calculation of the back pay award, if any, open with the Arbitrator retaining jurisdiction to resolve the remedy issue should the parties be unable to do so. The Arbitrator will set forth in the award section guidelines for the

parties to utilize in the computation for the monetary relief required by this award. However, considering the magnitude of this case, the Arbitrator specifically reserves the power to modify the guidelines should that become necessary as the parties seek to reach agreement of the amount due.

AWARD

Having reviewed all of the evidence and testimony submitted by the parties, the Arbitrator finds the Company violated the collective bargaining agreement when it terminated the grievants in this case and caused all of the logging work to be performed by nonbargaining unit contractors on a permanent basis. The grievance is sustained.

REMEDY

The Company is ordered to return the grievants to their former positions of which they were deprived because of the subcontractors. Further, the Company is ordered to make the affected employees whole for all loss of contractual benefits caused by the Company's breach of contract in September, 1982. From the grievants' back pay there shall be deducted any earnings and wages received during the period the grievants were not working because of the subcontractors.

The relief ordered pursuant to this award is a return to the status quo or what the parties referred to as the "average mix of 60% Company loggers and 40%

contractors." Hence, the back pay award shall be limited to a *maximum* of 60% of the work done by the contractors during the disputed period as if the contracting of all the work had not occurred. Finally, any of the grievants, assuming the 60%-40% mix, who would not have been called to work, even if the total subcontracting had not occurred, because of lack of work, insufficient seniority, etc. shall not be entitled to any relief under this award.

The Arbitrator will retain jurisdiction to resolve any disputes over the computation of the relief ordered until he receives written notice from the parties that agreement has been reached on the amount due pursuant to this award.

Respectfully submitted,

GARY L. AXON
Arbitrator
Dated: May 6, 1983

U.S. DISTRICT COURT
DISTRICT OF OREGON
FILED
OCT 17 1983
ROBERT M. CHRIST, *Clerk*
By Deputy

In The United States
DISTRICT COURT
for the District of Oregon

EDWARD HINES LUMBER COMPANY OF OREGON,

Plaintiff,

v.

LUMBER AND SAWMILL WORKERS UNION, Local No. 2588 and CENTRAL OREGON DISTRICT COUNCIL, LPIW,

Defendants.

Civil No. 83-780

FINDINGS AND RECOMMENDATION

Plaintiff brought this action pursuant to § 301 of the Labor Management Relations Act to vacate an arbitration award. Defendants filed a cross-complaint for confirmation of the arbitration award. Defendants now move for summary judgment on the grounds that there is no genuine issue as to any material fact, and that defendants are entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

I. FACTS

Defendant unions are the authorized collective bargaining representatives of certain of plaintiff's employees. On August 13, 1981, plaintiff entered into a written collective bargaining agreement with defendants. In September 1982, during the economic recession, plaintiff subcontracted logging operations which had formerly been performed by employees covered by the collective bargaining agreement. On September 20, 1982, the unions filed a written grievance pursuant to the collective bargaining agreement, alleging that plaintiff's actions were in violation of the agreement. The grievance procedures of the contract were exhausted, and an arbitration hearing occurred. The arbitrator's award upheld the grievance, finding a limitation on the company's right to subcontract logging. Plaintiff was ordered to reinstate the laid-off employees and to grant them backpay for money lost as a result of the subcontracting.

Plaintiff brought this action to vacate the award and to resubmit the dispute to a new arbitrator.

II. THE PARTIES' CONTENTIONS

Defendants contend that the dispute over subcontracting is arbitrable, and that the arbitrator did not exceed his authority in entering his decision, because it draws its essence from the terms of the labor agreement.

Plaintiff contends that the collective bargaining agreement expressly gives the company the right to

subcontract bargaining unit work, and that the arbitrator exceeded the authority granted him by the agreement when he found a limitation on the company's right to subcontract.

III. DISCUSSION

A. Arbitrability of the Dispute.

Defendants argue that the dispute was arbitrable. However, the plaintiff has not challenged the arbitrability. In fact, what plaintiff seeks is to have the dispute resubmitted to another arbitrator. Thus, there is no issue as to the arbitrability.

In any event, I find the subcontracting dispute to be arbitrable. In determining whether a dispute is arbitrable, a court must look to the terms of the arbitration agreement. *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241 (1962). In the instant case, a grievance is defined as a "dispute or difference between the Employer and the Union . . . involving the meaning, interpretation or application of the provisions of this Agreement." Collective Bargaining Agreement, Article IX, § 1. This broad provision, which contains no exclusions, would apply to the instant grievance. *See United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

B. Did the Arbitrator Exceed His Authority?

There is a strong presumption favoring the arbitration of disputes. *Nolde Bros.* v. *Local 358, Bakery Workers*, 430 U.S. 243, 254 (1977). A district court

ordinarily engages in only a very limited review of an arbitrator's decision. *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). The arbitrator's award is legitimate only so long as it draws its essence from the collective bargaining agreement. *Id.* An award is deemed to have drawn its essence from the collective bargaining agreement only where the arbitrator looked to the "words of the contract and to the conduct of the parties." *Broadway Cab Co-operative* v. *Local 281*, 710 F.2d 1379, 1382 (9th Cir. 1983).

1. *Contract Language.*

The collective bargaining agreement between the parties contains no specific mention of subcontracting. The arbitrator himself recognized this. Exhibit B at 58. The collective bargaining agreement expressly reserves to the company all rights not granted in the collective bargaining agreement. This reserved management rights clause provides:

> All the rights of management in the direction of the business, and the exercise of discretion reasonably related thereto, which have not been specifically abridged, delegated or modified by the Employer under a provision of this Agreement are recognized by the Union as being retained by the Employer.

Collective Bargaining Agreement, Article IV, § 1.

Article XX, Section 2, of the agreement states that the agreement as written is in "full and final settle-

ment of all issues of collective bargaining" and is the "sole and entire agreement of the parties."

The plaintiff contends that the management rights clause clearly and unambiguously gives management the right to subcontract, and that the arbitrator ignored this language. Plaintiff also contends that since there is no express contract language limiting the right to subcontract, the arbitrator's decision does not draw its essence from the words of the contract.

The defendants argue that the arbitrator based his decision on the express terms of the contract, because he interpreted the recognition, seniority, and wage provisions of the contract as implying a limitation on the employer's right to subcontract.

In his arbitration award, the arbitrator found an implied limitation on the right to subcontract, even in the face of the management rights clause. Exhibit B at 61. He stated that such an implied limitation was consistent with the implied covenant in *every* contract that neither party shall do anything which will have the effect of destroying or nullifying the rights of the other party to receive the benefits of the agreement. *Id.* at 61, 68. He states that the principles of protecting the job security objectives of the recognition, seniority and various provisions of *other* contracts have been fully established in the current period of labor-management relations, *id.* at 68, and that such clauses have in the past been found to limit the right to subcontract. *Id.* at 60. However, the only reference he makes to specific language in *this* contract is that "the recogni-

tion, seniority, wage and other clauses in the agreement do not provide an absolute bar to subcontracting." *Id.* at 61. From this broad language, it cannot be said that the arbitrator's decision clearly draws its essence from the collective bargaining agreement.

Defendants rely heavily, but erroneously, on *United Steelworker of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960). In that case, the Supreme Court held that a dispute over subcontracting was arbitrable, where the contract was silent as to subcontracting, contained a mangement rights clause, and had a broad arbitration provision for differences arising "as to the meaning and application of the provisions of this Agreement." The Court stated that "contracting out work is the basis of many grievances, and that type of claim is grist in the mill of arbitrators." *Id.* at 584. Defendants argue that this supports the proposition that an arbitrator has authority to imply a limitation on subcontracting, even when a contract is silent. However, the fact that a subcontracting dispute is arbitrable under a silent contract does not imply that an arbitrator may then find a limit on subcontracting. There is a presumption favoring the arbitrability of disputes and doubts are resolved in favor of coverage. *Id.* at 582-83. Holding that subcontracting is arbitrable under broad contract language providing arbitration for differences arising as to the meaning of a contract, even if the contract is silent as to subcontracting, is far different from finding that subcontracting violates that same contract. "The fact that the

dispute is arbitrable does not mean that the arbitrator may go beyond the limits of the collective bargaining agreement . . ." *Hoffler* v. *Short*, 297 F.2d 153 (1961) (citing *Warrior and Gulf Navigation*).

Defendants also rely on *Mobil Oil Corp.* v. *Local 8-766*, 600 F.2d 322 (1st Cir. 1979), where, again, the holding was that the arbitrator had jurisdiction to arbitrate a dispute over subcontracting, in the absence of an express contract provision pertaining to subcontracting. The employer had sued to vacate the arbitration award, which found an implied limitation on subcontracting. In finding that the arbitrator had jurisdiction, the court confirmed the award, although the award itself was not fully discussed. In that case, no mention was ever made of a reserved management rights clause. Also, the court found in the arbitrator's decision "specific reference to violations of the recognition clause, seniority, and wage and classification provisions of the agreement." *Id.* at 328. The brief mention of the "recognition, seniority, wage and other clauses" that the arbitrator made in the present case does not constitute "specific reference to violations" of these clauses.

The defendants argue that the arbitrator discussed every factor which could possibly be relevant to the propriety of the subcontracting. However, the agreement limits the arbitrator's authority to "interpretation and application of such terms of this agreement as have been placed in issue by the parties." Collective Bargaining Agreement, Article XI, step 4. The arbi-

trator does not have the power to "enlarge, diminish, alter, or amend the working agreement between the parties." *Id.* Courts have vacated arbitration awards where an arbitrator "implied" additions to a collective bargaining agreement which expressly limited the arbitrator's authority to interpretation of the contract. *Washington Hospital Center* v. *Local 722*, — F. Supp. —, 112 L.R.R.M. 3008 (W.D. Wash. 1983).

I cannot say that the arbitration award in this case looks to the words of the contract, and draws its essence therefrom.

2. *Conduct of the Parties.*

Plaintiff argues that the arbitrator also ignored past conduct of the parties. Evidence was presented to the arbitrator indicating that the company had always subcontracted bargaining unit logging work, and the work subcontracted had at times been as high as forty percent of the total logging work. Exhibit C at 240. The union had unsuccessfully sought to negotiate express subcontracting limitations in four consecutive sets of negotiations — 1972, 1975, 1977, and 1980. *Id.* at 198-99. The union had previously filed grievances regarding subcontracting. In the three that went to arbitration, the arbitrators held that the company was not in violation of the agreement. Exhibit D at 418-65. The arbitrator discussed this past conduct in his award. Exhibit B at 61-70. However, I cannot say that he "looked to" or considered the conduct of the parties in formulating his award, as required by *Broadway Cab*

Co-operative v. *Local 281*, 710 F.2d 1379, 1382 (9th Cir. 1983). In *United Steelworkers* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960), the Court stated, "[t]he industrial common law . . . the practices of the industry and the shop . . . is equally a part of the collective bargaining agrement although not expressed in it." *Id.* at 581-82. An award which fails to consider past practices, past negotiations of a disputed clause, and past arbitral decisions does not draw its essence from the collective bargaining agreement. *Clinchfield Coal Co.* v. *District 28, United Mine Workers of America*, 556 F. Supp. 522, 527-28 (1983).

IV. CONCLUSION

Despite the past conduct of the parties, the broad management rights clause, and the absence of express contract language limiting the right to subcontract, the arbitrator found that an implied limitation existed. He states that other clauses in the contract do not provide an absolute bar to subcontracting, but he does not discuss how subcontracting violates these other clauses. After reading the arbitrator's award, it cannot be said that he look to the words of the contract and to the conduct of the parties.

Summary judgment is appropriate only when there is no issue of material fact, and when viewing the evidence and inferences which may be drawn therefrom in the light most favorable to the adverse party, the movant is clearly entitled to prevail as a matter of law. *Gaines* v. *Haughton*, 645 F.2d 761 (9th Cir. 1981),

cert. denied, 454 U.S. 1145 (1982). It cannot be stated that the arbitrator's award draws its essence from the collective bargaining agreement, and that he did not exceed his authority. Therefore, defendants are not clearly entitled to judgment as a matter of law. The defendants' motion for summary judgment should be denied.

Dated this day of October, 1983.

United States Magistrate

U.S. DISTRICT COURT
DISTRICT OF OREGON
FILED
DEC 12 1983
ROBERT M. CHRIST, *Clerk*
By Deputy

In The United States
DISTRICT COURT
for the District of Oregon

EDWARD HINES LUMBER COMPANY OF OREGON,	)	
Plaintiff,	)	CIVIL No.
v.	)	83-780
LUMBER AND SAWMILL WORKERS UNION, Local No. 2588 and CENTRAL OREGON DISTRICT COUNCIL, LPIW,	)	*ORDER*
Defendants.	)	

Magistrate George E. Juba filed his Findings and Recommendation on October 17, 1983. The matter is now before me pursuant to 28 U.S.C. § 636(b) (1) (B). When either party objects to any portion of the Magistrate's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate's report. 28 U.S.C. § 636(b) (1) (C) ; *McDonnell Douglas Corp.* v. *Commodore Business Machines, Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981).

Defendants timely filed objections and a hearing

was held on those objections. I have given this matter a *de novo* review. I ADOPT the Magistrate's Findings and Recommendation that defendants' motion for summary judgment be DENIED. Further, I hereby GRANT plaintiff's motion for summary judgment.

IT IS SO ORDERED.

DATED this —— day of December, 1983.

OWEN M. PANNER
United States District Judge

RELEVANT CONTRACTUAL PROVISIONS

Article I, Section 1.

> "*Section 1.* This Agreement applies to all employees of the Employer at its John Day, Oregon, sawmill, Mt. Vernon Veener plant, Company logging, transportation, and Seneca reloading operations in the departments hereinafter set forth, except guards and watchmen, office and clerical employees, leased truck operators at Mt. Vernon Veneer Plant, supervisors and professional employees as defined in the Act."

Article II.

> "The Employer recognizes the Union as the sole collective bargaining agent for regular full and part-time employees in the bargaining unit described in Article I."

Article III, Section 1.

> "*Section 1.* All employees covered by this Agreement shall, as a condition of employment, become members of the Union by the 31st day following their employment or the effective date of this Agreement, whichever is the later, and thereafter remain members of the Union through the tender of the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership in the Union."

Article IV, Section 1.

> "*Section 1.* All rights of management and direction of the business, and the exercise of discretion reasonably related thereto, which have not been specifically abridged, delegated, or modified by

the Employer under a provision of this Agreement are recognized by the Union as being retained by the Employer."

Article V, Section 1.

"*Section 1.* The Employer has the right to hire any person as an employee and to suspend or discharge employees for just cause."

Article VIII, Section 1 and Section 2.

"*Section 1. General.* This Article relates to workdays, workweeks and work schedules and is not a guarantee that work will be provided.

Section 2. Workweek and Workday. The workweek shall begin on Monday and end on Sunday. Each employee's workday shall be the twenty-four (24) hour period beginning with the start of his regularly assigned shift."

Article X, Section 1.

"*Section 1. Definition.* Seniority of all present and future employees shall commence with the last day of hire. For the purpose of this Agreement, plant seniority shall be defined as continuous service in the operation of the Employer covered by this Agreement. Departmental seniority shall be seniority applied in the specific departments as follows:

GROUP I — Sawmill Operations.

(a) Sawmill Production (including Seneca Reload) operators.
(b) Maintenance Department.
(c) Dry Kiln and Powerhouse Department.

GROUP II — Veneer Operation.

(d) Mt. Vernon Veener Plant operators.

GROUP III — Logging Operations.

(e) Falling and Bucking Department.
(f) Skidding Department.
(g) Yarding Department.
(h) Road Crew Department.
(i) Loading and Unloading Department.
(j) Logging Department Transportation.
(k) Shop Department.
(l) Salvage Logging Department.

For purposes of this provision, all fallers shall be in the Falling and Bucking Department, all loaders and unloaders shall be in the Loading and Unloading Department, and all green chain employees shall be in the Dry Kiln and Powerhouse Department which shall include green chain, yard, dry kiln, and powerhouse personnel.

In the event of a layoff, those employees who have exhausted departmental seniority will have preference over new hires in all departments. Employees desiring an opportunity for recall under this provision shall sign a recall sheet, giving their telephone number, within forty-eight (48) hours of layoff. Thereafter an employee shall have an opportunity to place his name on such list. Recall shall be on the basis of seniority and qualifications of those on the list. There shall be no interdepartmental bumping."

Article XI, Section 2, Step 4.

"*STEP 4* — In the event the parties are unable to reach a settlement of the grievance at Step 3 and

the matter is appealed, the dispute shall be submitted to an impartial arbitrator. In the event mutual agreement cannot be reached on the naming of an impartial arbitrator with ten (10) working days from receipt of written notice of appeal to arbitration, they shall strike names alternately from a panel established under Section 3 hereof, until one (1) name remains, and he shall be the arbitrator. The cost of said arbitration proceedings shall be borne equally by the Employer and the Union except that each party shall pay all expenses incident to its own witnesses, evidence, or copy of any transcript of testimony. The parties shall attempt in good faith to agree upon a joint stipulation of the issue to be decided and the pertinent facts which are not in dispute. The arbitration decision shall be issued within thirty (30) days following the close of the hearing or following receipt of the transcript and briefs, if any. The arbitrator shall have no authority to enlarge, diminish, alter or amend the working agreement between the parties and shall confine his decision to interpretation and application of such terms of this Agreement as have been placed in issue by the parties."

Article XVIII, Section 1 and Section 2.

"*Section 1. Schedule of Classification and Rates.* Attached hereto as part of this Agreement, and marked Exhibits 'B', 'C', and 'D' are the schedules of job clasifications and regular straight-time hourly wage rates to become effective June 1, 1980. Said schedule of rates is mutually acceptable as of this Agreement.

Section 2. Wage and Benefit Closure. Except as otherwise provided herein, the subjects of general wage rate or other economic adjustments and individual classification adjustments are closed to bargaining until May 31, 1983, except that such closure will not bar negotiations on rates of pay for newly established job classifications, or on classifications wherein there has been a substantial change in job content following the date of this Agreement."

Article XX, Section 2.

"*Section 2. Entire Agreement.* This Agreement is in full and final settlement of all issues of collective bargaining and constitutes the sole and entire agreement between the parties. The terms of this Agreement may be supplemented, amended or waived only by mutual agreement in writing executed by the parties hereto."

Article XXI, Section 2.

"*Section 2. Closure.* The parties hereto agree that this collective bargaining agreement concludes and precludes bargaining for the term thereof on any and all issues of matters subject to bargaining except as otherwise specifically provided herein."

All arbitration testimony relating to percentage of contract logging:

The Union's witness, Ralph Dickinson, testified:

"Q. [by Union's attorney] O.K. As of the time of those negotiations, what was the situation here at the John Day logging operation with respect to subcontractors and company loggers? What was the percentage of the mix ?

"A. I'm sorry, Bernie, I couldn't give you a percentage.

"Q. You have no idea ?

"A. I couldn't give you a percentage, I'm sorry.

"Q. All right, but, there was a —

"A. There was a mix.

"Q. — mix.

* * * * *

"Q. Was there a mix of subcontractors and company loggers at that time ?

"A. Uh huh.

"Q. Was that part of the *status quo* ?

"A. Certainly, certainly." (MSJ 101, 110)

A company witness, Jack Young, testified on cross-examination:

"Q. [by Union's attorney] Since 1971, what's been the ratio up until the time you eliminated them between company and subcontractors ?

"A. That's varied.

"Q. Well, on the average ?

"A. Probably it averaged out around 60 percent, the figure you said earlier [in opening argument].

"Q. Sixty percent company and 40 percent subcontractors ?

"A. That's correct.

"Q. Would that have been the average, as far as you know, even before you got here when they were using both ?

"A. I don't know. I would doubt that it was that much, or it might have been more. I don't —

"Q. More what ?

"A. More contractor. I really don't know.

"Q. But, at least in 1971 that's a fair estimate — 60-40 ?

"A. Yes. Or that's an average, you know.

"Q. Yes. A fair average estimate.

"A. Yes." (MSJ 240-241)

85-1399 (2)

Supreme Court, U.S.
FILED
MAR 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EDWARD HINES LUMBER COMPANY OF OREGON,

Petitioner,

v.

LUMBER AND SAWMILL WORKERS LOCAL NO. 2588 and CENTRAL OREGON DISTRICT COUNCIL, LPIW,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR CERTIORARI

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I.

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit clearly erred when it ruled that the arbitrator did not exceed his authority in finding contractual limitations on subcontracting of bargaining unit work.

II.

TABLE OF CONTENTS

		Page
I.	QUESTIONS PRESENTED	i
II.	TABLE OF CONTENTS	ii
III.	TABLE OF AUTHORITIES	ii
IV.	QUESTIONS PRESENTED	1
V.	OPINIONS BELOW AND JURISDICTION	1
VI.	STATUTES INVOLVED	1
VII.	STATEMENT OF THE CASE	1
	A. Basis for Federal Jurisdiction	1

		Page
	B. Facts	2
	C. Proceedings Below	5
VIII.	SUMMARY OF ARGUMENT	5
IX.	ARGUMENT	6
	A. There are No Compelling Reasons for Granting Certiorari	6
	B. The Employer Seeks To Have This Court Overturn Settled Law . . .	13
X.	CONCLUSION	30

III.

TABLE OF AUTHORITIES

Cases

Bendix Corp., 41 LA 905 (1963) . . .	25
Celanese Corp. of America, 33 LA 925 (1959)	20
Clinchfield Coal v. District 28, United Mine Workers, 720 F.2d 1365 (4th Cir. 1983) . . .	11

Page

Clinchfield Coal v. District 28, United Mine Workers, 736 F.2d 998 (4th Cir. 1984) 11

Continental Tennessee Lines, Inc., 72 LA 619 (1979) 25

General Metals Corp., 25 LA 118 (1955) 21

Illinois Coil Spring Co., 268 N.L.R.B. No. 87, 115 LRRM 1065 (1984); aff'd 765 F.2d 175, 119 LRRM 2801 (D.C. Cir. 1985) . 28

Magnum Import Co. v. Coty, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922 (1922) 9

Mead Corp., 62 LA 1000 (1973) . . . 24, 26

Mead Corp., 75 LA 665 (1980) 27

Mobil Oil Corp. v. Local 8-766, 600 F.2d 322 (1st Cir. 1979) 21

New Britain Machine Co., 8 LA 720 (1947) 21

Rice v. Sioux City Cemetery, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955) 8

Page

Sears, Roebuck and Co. v. Teamsters Local Union No. 243, 683 F.2d 154 (6th Cir. 1982); cert. denied 460 U.S. 1023, 103 S.Ct. 1274, 75 L.Ed. 495 (1983) 23

Town of Van Buren, Maine, 80 LA 105 (1982) 27

Uniroyal, Inc., 76 LA 1049 (1981) . 27

United Farm Tools, 80 LA 864 (1983) 27

United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) . . 17, 21, 23

United Steelworkers v. Enterprise Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) 13, 15, 17, 23

W.R. Grace and Co. v. Local 759, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983) 28

Rules

Rule 17, United States Supreme Court 6, 13

Statutes

	Page
9 USC §§ 9, 10	1
29 USC § 173(d)	17
29 USC § 185(a)	1

Treatises

Elkouri and Elkouri, How Arbitration Works, Fourth Ed. (1985) . .	26

V.

OPINIONS BELOW AND JURISDICTION

Respondents are satisfied with petitioner's statement of opinions below and jurisdiction.

VI.

STATUTES INVOLVED

This case involves the interpretation of a collective bargaining agreement between the parties. Neither federal nor state statutes have direct bearing on the issues.

VII.

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction

The district court below has jurisdiction under 29 USC (185(a) and 9 USC ((9, 10.

B. Facts

Respondents (hereafter the Union) are the exclusive bargaining representatives for employees of petitioner Edward Hines Lumber Company of Oregon (hereafter the Employer). The employer operates several facilities and related logging operations in the vicinity of John Day, Oregon. On or about August 13, 1981, the employer entered into a three-year collective bargaining agreement. In September 1982, the employer eliminated its logging crews which were represented by the Union and replaced them with unrepresented subcontractors. Approximately 76 employees were permanently replaced as a result. On September 20, 1982, the Union filed a grievance concerning this action. Pursuant to the collective bargaining agreement, the grievance

procedures were exhausted and the parties agreed to arbitrate the dispute. At the arbitration, the Union stated the issue to be: Did the company violate the collective bargaining agreement in September 1982 by unilaterally eliminating the entire logging department during the term of the collective bargaining agreement? The employer stated the issues to be: (a) Is there any contract limitation on the company's right to subcontract logging; and (b) does the arbitrator have any contractual authority to imply any such limitation? On May 6, 1983, the arbitrator rendered a decision and award upholding the Union's grievance. [1]

---

[1] Respondents respectfully submit that the opinion and award of the arbitrator speaks for itself and is attached in the Appendix of petitioner's brief, and thus needs no further commentary in the Statement of Facts. (App. C to Petition for Writ of Certiorari, pp. C-1 through C-32.)

The evidence at the arbitration hearing established that it had always been the employer's practice to use a mix of company loggers and subcontractors. The employer had never utilized only subcontractors and totally excluded company loggers. The employer had consistently utilized a mix of approximately 60% company loggers and 40% subcontractors. On several occasions, the employer informed the Union that it had no intention of changing this policy.

The Union attempted over the years to negotiate language which would have kept the employer from using <u>any</u> subcontractors to perform bargaining unit work. Such a provision was never agreed to and the employer continued its practice of using both company loggers and contractors to perform logging work.

Over the years, the Union filed grievances and proceeded to arbitration in cases involving subcontracting. None of the grievances or arbitrations involved situations in which the employer permanently replaced company logging employees with subcontractors.

C. Proceedings Below

Respondents are essentially satisfied with petitioner's version of proceedings below. Respondents would submit that the opinions of the arbitrator and courts below speak for themselves and are included in the Appendix of Petitioner's Brief.

VIII.

SUMMARY OF ARGUMENT

The stated issues underlying petitioner's request for a Writ of Certiorari are

limited to the interpretation of a particular collective bargaining agreement and have no national importance. In attempting to challenge the arbitrator's decision, the employer seeks to overturn settled law concerning the limited role of the judiciary in its review of arbitration awards.

IX.

ARGUMENT

A. There Are No Compelling Reasons for Granting Certiorari

Supreme Court Rule 17 states that review on writ of certiorari ". . . will be granted only when there are special and important reasons therefor." (Emphasis added.) In the instant case, such "special and important reasons" are lacking. The employer asks this Court to disturb the interpretation of a collective bargaining

agreement rendered by an impartial arbitrator selected by both parties. The collective bargaining agreement negotiated by the parties was entered into on August 13, 1981, had a finite term of three years and is long expired. It contained provisions tailored by the parties to suit their specific individual needs and was not a contract of any nationwide impact. As an aid to interpreting the agreement, the arbitrator carefully examined past practices of the parties, practices which were unique to the parties and which also had no nationwide importance. The arbitrator's interpretation of such a particularized collective bargaining agreement between these parties hardly rises to the status of a case in which there are "special and

important" reasons for granting a Writ of Certiorari.

The legal and factual issues decided by the arbitrator in this case, while of importance to the parties themselves, are of little or no concern to the general public. Under such circumstances, a writ of certiorari must be denied. In Rice v. Sioux City Cemetery, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955), the Supreme Court dismissed a writ of certiorari as having been improvidently granted, and quoted former Chief Justice Taft as follows:

> ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties and in cases where there is a real and embarrassing conflict of opinion between the circuit courts of appeal." Id. at 79.

Jurisdiction on writ of certiorari was not conferred upon the Supreme Court merely to give the defeated party in the circuit court of appeals another hearing on the merits. Magnum Import Co. v. Coty, 262 U.S. 159, 163, 43 S.Ct. 531, 67 L.Ed. 922 (1922).

In the instant case, the employer masks the essentially private nature of the dispute by overstating the importance of this case to other employers. Employers who wish to protect their ability to subcontract work even to the point of permanently eliminating the jobs of their own employees are capable of protecting their own interests at the bargaining table. In the instant case, the employer never before attempted to subcontract work while permanently laying off bargaining

unit employees; it always utilized a mix of company employees and contractors and it assured the Union on several occasions that it had no intention of changing this practice. The employer never "protected" its ability to emasculate the bargaining unit by replacing its members with subcontractors. The arbitrator in the instant case recognized that the permanent replacement of bargaining unit members with contractors manifested a clear infidelity to the promises made by the employer in the collective bargaining agreement and, in essence, negated that agreement. Clearly, this decision, stemming as it did from the facts of the case, can have little or no effect on other employers, who are free to structure their negotiations and actions as they see fit and according to law.

The employer's attempt to create a "conflict" between the circuit courts of appeal must also fail. The Ninth Circuit's decision in the instant case is perfectly consistent with the decisions of the Fourth Circuit in Clinchfield Coal v. District 28, United Mine Workers, 720 F.2d 1365 (4th Cir. 1983) and Clinchfield Coal v. District 28, United Mine Workers, 736 F.2d 998 (4th Cir. 1984). In these cases, the labor agreement stated that contracting of coal mining operations was prohibited only if it caused the layoff of bargaining unit employees. The Fourth Circuit decided that arbitration awards in favor of the union did not draw their essence from the agreement because the arbitrators involved failed to even consider evidence that any layoffs caused were the result of general

economic conditions and not contracting. The crux of these decisions is that, in light of the express contract language stating that the contracting must cause the layoffs to be impermissible, the arbitrators were duty bound to at least consider evidence of other causal factors. In the instant case, however, the Ninth Circuit recognized that the arbitrator carefully considered and analyzed all of the employer's contentions and specifically addressed them in his decision. It is thus clear that the employer has failed to demonstrate a "real and embarrassing" conflict between the circuit courts of appeal such as to justify granting a writ of certiorari in the instant case. None of the factors listed as guidelines for the granting of a writ of certiorari in Supreme

Court Rule 17 is present herein and the employer's petition should thus be denied.

B. The Employer Seeks to Have This Court Overturn Settled Law

In asking this Court to set aside the arbitrator's carefully reasoned decision, the employer seeks to overturn well settled case law. Such an attempt makes the grant of a writ of certiorari particularly inappropriate. The instant case is governed by this Court's decision in United Steelworkers v. Enterprise Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). In that case, an arbitrator ordered an employer to reinstate certain employees and pay them back wages for a period of time when the collective bargaining agreement between the company and union had expired. The employer argued that the award was

unenforceable due to the contract expiration and the circuit court agreed. The Supreme Court granted certiorari and reversed. The Court stated:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the award." Id. at 596.

The Court reasoned that the arbitrator was commissioned to bring his informed judgment to bear upon the problem before him and needed flexibility in order to be able to meet a wide variety of factual situations which the drafters of the contract might not have envisioned. The Court stated:

> "He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the contract." Id. at 597.

The Court ruled that the arbitrator's award did draw its essence from the contract and stated:

> "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." Id. at 599. (Emphasis added.)

The arbitrator's decision to continue back pay and order reinstatement even after the expiration of the agreement was thus upheld.

United Steelworkers v. Enterprise Corp., supra, is dispositive in the instant case. The arbitrator herein construed the contract's recognition, union security, hours of labor, seniority and other clauses as manifesting a promise not to permanently replace employees with subcontractors

during the term of a valid collective bargaining agreement. The arbitrator furthermore considered the employer's argument that the "management rights" clause and the "entire agreement" clause meant that he had no authority to find any limits on subcontracting even if this resulted in the permanent replacement of bargaining unit employees. The arbitrator construed all applicable provisions of the agreement cited by both parties and decided that the complete cessation of company logging under the unique facts and circumstances of the case before him violated the mutual understandings and practices between the parties. (App. C to Petitioner's Brief, p. C-29.) The arbitrator's decision clearly concerned "construction of the contract" within the meaning of this

Court's decision in United Steelworkers v. Enterprise Corp., supra. The Ninth Circuit's decision that the district court had no business overruling the arbitrator merely because it disagreed with his construction of the contract was correct. To rule otherwise would be to put the courts in the business of reviewing arbitration awards on their merits, which would have the effect of undermining the federal policy of private dispute resolution through final and binding arbitration. See, for example, 29 USC (173(d).

This Court's decision in United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960) is also of paramount importance to the case at bar. In this case, the union filed a grievance protesting the

contracting out of work normally performed by bargaining unit members. The employer refused to arbitrate the dispute on the grounds that the agreement stated that "matters which are strictly a function of management shall not be subject to arbitration." Id. at 576. The union sued to compel arbitration. The district court dismissed the union's complaint on the grounds that the agreement did not "confide in an arbitrator the right to review the defendant's business judgment in contracting out work." Id. at 577. The Court of Appeals affirmed. The Supreme Court reversed and held the dispute to be arbitrable. At the outset, the Court made it clear that a collective bargaining agreement may not be judged simply by its four corners. The Court stated:

> "It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. . . . The collective bargaining agreement covers the whole employment relationship. It calls into being a new common law - the common law of a particular industry or of a particular plant. Id. at 578-579.

The Court stated that the arbitrator's source of law was not confined to the express provisions of the contract "as the industrial common law - the practices of the industry and the shop - is equally a part of the collective bargaining unit although not expressed in it." Id. at 581-582. Having discussed the role of the arbitrator in general, the Court then went on to analyze the specific dispute before it. The Court interpreted the language "strictly a function of management" as referring "only to that over which the

contract gives management complete control and unfettered discretion." Id. at 584. The Court was of the opinion that silence on the subject of subcontracting did not mean that this was an inherent right of management which was totally unlimited by the contract. The Court ruled that subcontracting disputes were "grist in the mills of arbitrators" and it cited an arbitration award, Celanese Corp. of America, 33 LA 925 (1959), in which the arbitrator had researched applicable law and found 64 arbitration decisions concerning the right to subcontract under a silent contract. Id. at 584, n. 8. It should be noted that many of the cases cited by the arbitrator in Celanese Corp. of America, supra, at 942-943, involved arbitrators finding limitations on the power to

subcontract under contracts which were silent on the issue and which contained broad management rights clauses. See, for example, New Britain Machine Co., 8 LA 720 (1947); General Metals Corp., 25 LA 118 (1955). The Supreme Court's decision in United Steelworkers v. Warrior and Gulf Navigation Co.., supra, thus recognized, sub silentio, that arbitrators have the inherent authority to find some limits on subcontracting even under contracts which are silent on the subject and which contain broad management rights clauses.

Cases which have squarely addressed an arbitrator's authority to find a limitation on subcontracting under a silent agreement have upheld such authority. In Mobil Oil Corp. v. Local 8-766, 600 F.2d 322 (1st Cir. 1979), the employer subcontracted

truck driving work which eliminated bargaining unit jobs. The case was arbitrated, the arbitrator ruled in favor of the union and found that the contracting was a breach of contract which avoided the terms and conditions of the contract. Id. at 324. The contract was silent on subcontracting and contained a clause which gave the arbitrator the power to interpret the express provisions of the agreement, but no power to add to, modify or expand those provisions. Id. at 327. The employer moved to vacate the arbitrator's award. The district court denied the employer's requested relief. The First Circuit Court of Appeals affirmed and ruled that the arbitrator did not base his decision upon the presumed and implied obligations of the parties, but rather had based his decision

on the express terms of the contract, the recognition, seniority, wage and other clauses. Id. at 328. The court stated:

> "The permanent elimination of jobs goes to the heart of a collective bargaining agreement and does implicate these basic provisions." Id. at 329.

This decision affords proper deference to the arbitrator's judgment and is in accord with the Steelworkers cases, supra.

In another case which involved subcontracting, Sears, Roebuck and Co. v. Teamsters Local Union No. 243, 683 F.2d 154 (6th Cir. 1982); cert. denied 460 U.S. 1023, 103 S.Ct. 1274, 75 L.Ed. 495 (1983), the court upheld the right of an arbitrator to find a limitation under a contract which was silent on subcontracting. In this case, the contract stated that the right to subcontract was vested exclusively with the

company. The arbitrator found a violation despite this clear language and the court ruled that he had exceeded his authority in doing so. The court stated, however, that it was "accepted practice for arbitrators to infer a 'reasonableness' limitation on the employer's right to subcontract" when contracts are silent on this issue, and in support of this opposition, it cited Mead Corp., 62 LA 1000 (1973), where the arbitrator found a limitation even under a broadly worded management rights clause. Id. at 156. It is thus clear that neither the Supreme Court, the First Circuit, the Sixth Circuit, nor the Ninth Circuit have ever taken the position that an arbitrator is powerless to find limitations on subcontracting under contracts which are silent on the subject.

In addition to the above-mentioned judicial authority, arbitral authority also establishes that arbitrators may find limits on subcontracting under silent contracts. Thus in Continental Tennessee Lines, Inc., 72 LA 619 (1979), the arbitrator framed the following question:

> "When a three year employment contract specifies hours, wages, and other benefits, reserves the employer's right to abolish the job and otherwise operate and conduct its business, would a reasonable man about to enter into that agreement understand that the company, for economic reasons, can furlough him in favor of another who will do the work at less pay? Id. at 621.

The arbitrator answered "no" as any other answer "would frustrate the object and spirit of the agreement itself." Id. at 621. See Bendix Corp., 41 LA 905 (1963). The modern trend of arbitral

authority is that the contract's recognition and other clauses limit subcontracting and to reject the "reserved rights" theory which holds that management can subcontract at will and which is being advanced by the employer in the instant case. See Elkouri and Elkouri, How Arbitration Works, Fourth Ed. (1985), p. 538.

Many arbitrators have found powerful limitations on subcontracting even faced with strongly worded management rights clauses. In Mead Corp., supra, the arbitrator found a violation of the recognition and other clauses of the contract even in the face of a management rights clause which stated that "all other rights not specifically nullified by this agreement are retained by the company." Supra at 1004. Other cases which hold that

limitations exist even in the face of a management rights clause are almost too numerous to mention. See, for example, United Farm Tools, 80 LA 864 (1983); Town of Van Buren, Maine, 80 LA 105 (1982); Uniroyal, Inc., 76 LA 1049 (1981); Mead Corp., 75 LA 665 (1980). The arbitrator in the instant case merely followed the great weight of arbitral authority in reaching his decision. In doing so, he rejected the employer's argument that the existence of a management rights clause automatically gave it the right to subcontract at will even to the point of eliminating bargaining unit jobs. The employer, however, urges this Court to disregard its own case law, that of the circuit courts of appeal, and the modern trend of arbitral authority in favor of a novel and untested theory of arbitral

authority which has gone unaccepted by any appellate court to this point and for which there is no other legal authority. [2]

An additional reason exists for denying certiorari in the instant case. In W.R. Grace and Co. v. Local 759, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983), this Court upheld the enforcement of an arbitrator's award against the argument that he had exceeded his authority. In that case, the arbitrator refused to be

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[2] The employer's citation of Illinois Coil Spring Co., 268 N.L.R.B. No. 87, 115 LRRM 1065 (1984); aff'd 765 F.2d 175, 119 LRRM 2801 (D.C. Cir. 1985) is misplaced as this National Labor Relations Board decision merely stated that a specific decision to relocate a business did not constitute an illegal midterm modification of a contract under 29 USC (158(d). Nothing in the Illinois Coil Spring Co. case states that an arbitrator has no authority to find a contract violation concerning subcontracting of bargaining unit work after looking to the words of the contract and the practices of the parties.

bound by a prior arbitrator's decision due to his interpretation of the contract. The Court stated:

> "Because the authority of arbitrators is a subject of collective bargaining, the scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator." Id. at 306.

This statement has relevance to the instant case where the employer expressly placed the issue of the arbitrator's authority to find a limitation on subcontracting before the arbitrator for decision. Having given the arbitrator the authority to decide this issue, it seems slightly disingenuous for the employer to now argue that he exceeded his authority in doing so. The employer bargained for a decision on this issue and should not now be able to avoid that decision.

X.

CONCLUSION

For the above reasons, the employer's petition for writ of certiorari should be denied.

DATED this ____ day of March, 1986.

Respectfully submitted,

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March 20, 1986

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MAR 21 1986

(3)

No. 85-1399

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

EDWARD HINES LUMBER COMPANY OF OREGON,
Petitioner,

v.

LUMBER AND SAWMILL WORKERS LOCAL NO. 2588 and
CENTRAL OREGON DISTRICT COUNCIL, LPIW,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 36.1, the Chamber of Commerce of the United States ("Chamber") hereby moves for leave to file the attached brief *amicus curiae* in support of the Petitioner.[1] The Chamber is the nation's largest federation of businesses, with a membership of more than 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. One of the Chamber's principal functions is presenting its members' views in court on issues significant to the business community. In furtherance of this objective, the Chamber has

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[1] This motion is necessary because repeated efforts to obtain the consent of the Respondents have been unsuccessful. The Petitioner has consented to the filing, and its consent letter has been filed with the Clerk of the Court.

filed *amicus curiae* briefs in numerous important labor relations cases.[2]

The case before the Court raises critical questions involving the breadth of arbitrators' authority in interpreting collective bargaining agreements, and the scope of judicial review of such interpretations. Many Chamber members are signatories to collective bargaining agreements containing arbitration, management rights, and no-modification clauses similar to those interpreted in this case. Arbitrators' power to ignore these contractual limitations is of great concern to these businesses.

This Court established broad standards governing labor arbitrators' discretion and judicial review of arbitral decisions 25 years ago in the *Steelworkers Trilogy*. In those and subsequent decisions, the Court stressed the limited scope of judicial scrutiny of arbitration awards, and the importance of arbitration as a means of dispute resolution without court involvement.

The Chamber, like most businesses and business representatives, is vitally concerned about the growing frequency and expense of litigation, and strongly supports the use of arbitration as a voluntary method of settling labor disputes. However, the broad discretion the courts have accorded to arbitrators (whether or not the parties have done so by contract) and the deference they exercise in reviewing arbitration awards have created a process without safeguards, in which the decision of any arbitrator making "noises of contract interpretation"[3] has excellent prospects of judicial enforcement. While the

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[2] *See, e.g., Wisconsin Department of Labor and Industry* v. *Gould,* 54 U.S.L.W. 4228 (U.S. Feb. 26, 1986); *AT&T Technologies* v. *Communications Workers of America,* 751 F.2d 203 (7th Cir. 1984), *cert. granted,* 54 U.S.L.W. 3222 (U.S. Oct. 7, 1985) (No. 84-1913), *argued* (U.S. Jan. 22, 1986); *Pattern Makers League of North America* v. *NLRB,* 105 S. Ct. 3064 (1985).

[3] *Ethyl Corp.* v. *United Steelworkers of America,* 768 F.2d 180, 187 (7th Cir. 1985), *petition for cert. filed,* 54 U.S.L.W. 3311 (U.S. Oct. 16, 1985) (No. 85-670).

Chamber by no means asks the Court to open the entire field of labor arbitration to judicial scrutiny, it urges the Court to furnish the guidance needed by the lower courts to clarify the existing limitations on arbitrators' power.

The decision below is a classic example of the undue deference lower courts pay to arbitrators' "interpretations" of collective bargaining agreements. Here, the Ninth Circuit deferred to the interpretation of an arbitrator who ignored the contract's broad management rights clause and explicit restriction on arbitral authority, and inserted specific terms into the contract. Many lower courts similarly have misconstrued this Court's direction to uphold arbitral awards that "draw their essence" from the contract as mandating virtually absolute deference to arbitrators' discretion.[4] Immediate review is required to resolve this confusion in the circuits, and to instruct the lower courts on the proper standards for reviewing arbitration awards. For these reasons, the Chamber submits this brief and requests that the Court grant *certiorari.*

Respectfully submitted,

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[4] In fact, another Petition for Certiorari raising this issue and further demonstrating the difficulty the lower courts are experiencing in reviewing arbitration awards currently is pending before this Court. *Ethyl Corp.* v. *United Steelworkers of America,* No. 85-670 (*see* n.3, *supra*). The Chamber suggests that the Court grant *certiorari* in both cases, and hear them in tandem or consolidated for oral argument, in order to provide the certainty about enforcement of bargained-for contract terms which the business community requires.

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
STATEMENT OF THE CASE	1
ARGUMENT	4
I. THE NINTH CIRCUIT'S FAILURE TO VACATE AN ARBITRATION AWARD THAT VIOLATED THE EXPRESS TERMS OF THE PARTIES' CONTRACT DEMONSTRATES THE PRESSING NEED FOR THIS COURT TO CLARIFY THE STANDARDS GOVERNING ARBITRATORS' DISCRETION AND JUDICIAL REVIEW OF ARBITRAL AWARDS	4
A. Existing Standards: The *Steelworkers Trilogy*	4
B. Abuses Abound Under the "Essence" Test	5
CONCLUSION	9

TABLE OF AUTHORITIES

CASES — Page

Brotherhood of Locomotive Engineers v. *Atchison, Topeka & Santa Fe Ry. Co.*, 768 F.2d 914 (7th Cir. 1985) 6

Ethyl Corp. v. *United Steelworkers of America*, 768 F.2d 180 (7th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3311 (U.S. Oct. 16, 1985) (No. 85-670) 5, 6, 7, 8

Holly Sugar Corp. v. *Distillery Workers Int'l Union*, 412 F.2d 899 (9th Cir. 1969) 8

Illinois Coil Spring Co., 268 N.L.R.B. 601 (1984), *aff'd sub nom. International Union, UAW* v. *NLRB*, 765 F.2d 175 (D.C. Cir. 1985) 3

In re Andros Compania Maritima, S.A., 579 F.2d 691 (2d Cir. 1978) 7

International Brotherhood of Electrical Workers, Local Union No. 53 v. *Sho-Me Power Corp.*, 715 F.2d 1322 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984) 4

International Brotherhood of Electrical Workers, Local Union No. 199 v. *United Telephone Co.*, 738 F.2d 1564 (11th Cir. 1984) 7, 8

Jones Dairy Farm v. *Local No. P-1236, UFCW*, 755 F.2d 583 (7th Cir.), *rev'd on rehearing*, 760 F.2d 173 (7th Cir.), *cert. denied*, 106 S. Ct. 136 (1985) 6

Loveless v. *Eastern Air Lines, Inc.*, 681 F.2d 1272 (11th Cir. 1982) 5, 7, 8

Meyers v. *Parex, Inc.*, 689 F.2d 17 (2d Cir. 1982) .. 7

Miller Brewing Co. v. *Brewery Workers Local Union No. 9*, 739 F.2d 1159 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 912 (1985) 5, 7

Riceland Foods, Inc. v. *United Brotherhood of Carpenters & Joiners, Local 2381*, 749 F.2d 1260 (8th Cir. 1984) (*en banc*), *rev'g* 737 F.2d 758 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 2327 (1985) 8

Super Tire Engineering Co. v. *Teamsters Local Union No. 676*, 721 F.2d 121 (3d Cir. 1983), *cert. denied*, 105 S. Ct. 83 (1984) 8

TABLE OF AUTHORITIES—Continued

Page

United Electrical, Radio & Machine Workers of America, Local 1139 v. *Litton Microwave Cooking Products*, 728 F.2d 970 (8th Cir. 1984) (*en banc*) 9

United Steelworkers of America v. *American Manufacturing Co.*, 363 U.S. 564 (1960) 4

United Steelworkers of America v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960) 4, 5, 7

United Steelworkers of America v. *United States Gypsum Co.*, 492 F.2d 713 (5th Cir.), *cert. denied*, 419 U.S. 998 (1974) 8

United Steelworkers of America v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) 4, 5

W.R. Grace & Co. v. *Local 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757 (1983) 4

OTHER MATERIALS

Davey, *The Supreme Court and Arbitration; The Musings of an Arbitrator*, 36 Notre Dame Law. 138 (1961) 9

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST

The Chamber respectfully refers this Court to its Motion for Leave to File Brief Amicus Curiae for a statement of its interest in this proceeding.

STATEMENT OF THE CASE

This arbitration case arises out of a grievance filed by the Respondent union against the Petitioner, a lumber company that maintains a number of sawmill and logging

operations in eastern Oregon. The grievance protested the company's use of subcontractors for its logging operations, charging that the company unilaterally had eliminated union-represented employees from the logging crews and replaced them with non-union contractors.[1] Relying on the broad management rights clause in the parties' collective bargaining agreement, the company maintained that it had properly exercised its right to subcontract, and asserted that due to adverse economic conditions, it could not afford to use company loggers.[2]

On appeal of the company's denial of the grievance, the arbitrator found a "past practice" of limited use of subcontractors, and thus imposed a rigid requirement that the company maintain an "average mix of using 60% company loggers and 40% contract loggers," even though the contract contained no restriction on subcontracting. Petition for Cert. at C-30.[3] Despite the contract's explicit limitations on the arbitrator's authority,[4]

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[1] The company in the past had assigned some of its work to union-represented employees, and some to subcontractors. In June 1982, financial conditions forced the Petitioner to close several of its operations, including those in John Day, Oregon. Three months later, the company was financially able to reopen the John Day sawmill and recall 110 employees, but could not afford to recall the company loggers. Instead, it used logging contractors.

[2] The Petitioner directed the lower court's attention to the uncontradicted evidence that the company's economic motives to subcontract were based on the high capital costs of refurbishing and replacing the company's decrepit logging equipment, and the superior efficiency of the subcontractor's operations. *See* Brief of Appellee filed in the Ninth Circuit, at p. 21.

[3] Indeed, the union had attempted unsuccessfully in each of the four prior negotiating sessions to secure such a contractual limit, and had taken three grievances concerning subcontracting to arbitration, without success. *See* Petition for Cert. at 3.

[4] The contract contained a no-modification clause which provided:

> The arbitrator shall have *no authority* to enlarge, diminish, alter or amend the working agreement between the parties and

and its express reservation of all management rights to the company,[5] the arbitrator found an implied obligation not to contract out work in excess of a rough estimate of the average level of contracting over the prior 11 years.[6]

A magistrate for the U.S. District Court for the District of Oregon reviewed the arbitrator's decision, examining the contractual language and the parties' actions, and concluded that the arbitrator had exceeded his authority by limiting the company's right to subcontract. *Id.* at D-10. After *de novo* review, the U.S. District Court adopted the magistrate's decision. *Id.* at E-2. The union appealed this order.

The Ninth Circuit noted initially that judicial review of arbitration awards must be "quite circumscribed." Petition for Cert. at A-6. In considering whether this

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shall confine his decision to interpretation and application of such terms of this Agreement as have been placed in issue by the parties.

Article XI, Section 2, Step 4, Petition for Cert. at C-5, C-6 (emphasis added).

Moreover, the contract's merger clause provided that the contract "constitutes the *sole and entire agreement* between the parties," and "[t]he terms of this Agreement may be supplemented, amended or waived *only by mutual agreement in writing* executed by the parties hereto." Article XX, Section 2, Petition for Cert. at C-6 (emphasis added).

[5] The management rights clause stated:

"*All rights* of management and direction of the business, and the exercise of discretion reasonably related thereto, which have not been *specifically abridged*, delegated, or modified by the Employer under a provision of this Agreement are recognized by the Union as being *retained by the Employer.*"

Article IV, Section 1, Petition for Cert. at C-3 (emphasis added).

[6] As pointed out by the Petitioner, the contract contained no work preservation clause, and the NLRB has held that none can be implied based on wage and benefit or union recognition provisions. Petition for Cert. at 17, *citing Illinois Coil Spring Co.*, 268 N.L.R.B. 601 (1984), *aff'd sub nom. International Union, UAW* v. *NLRB*, 765 F.2d 175 (D.C. Cir. 1985).

award "drew its essence" from the collective bargaining agreement, the court saw its role as limited to "ensur-[ing] that the arbitrator *looked to the words of the contract and to the conduct of the parties.*" *Id.* at A-8 (emphasis added). After such review, the court concluded that it "[could] not say that the arbitrator's award was not a plausible interpretation of the agreement in the light of the parties' conduct." *Id.* at A-10. The company petitioned this Court for review of the Ninth Circuit's decision.

ARGUMENT

I. THE NINTH CIRCUIT'S FAILURE TO VACATE AN ARBITRATION AWARD THAT VIOLATED THE EXPRESS TERMS OF THE PARTIES' CONTRACT DEMONSTRATES THE PRESSING NEED FOR THIS COURT TO CLARIFY THE STANDARDS GOVERNING ARBITRATORS' DISCRETION AND JUDICIAL REVIEW OF ARBITRAL AWARDS.

A. Existing Standards: The Steelworkers Trilogy.

Courts reviewing arbitration awards typically recite the now-engrained principles this Court established in the seminal *Steelworkers* cases.[7] Judicial review of arbitration awards is limited, and a court may not redetermine the merits. *Enterprise Wheel*, 363 U.S. at 596; *W.R. Grace & Co.* v. *Local 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757, 764 (1983). The arbitrator's construction was bargained for, and a reviewing court need not agree with it. *Enterprise Wheel*, 363 U.S. at 599; *International Brotherhood of Electrical Workers, Local Union No. 53* v. *Sho-Me Power Corp.*, 715 F.2d 1322, 1326 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984).

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[7] *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564, 568-69 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960); *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596-97 (1960).

However, a court may not enforce an award unless it "*draws its essence* from the collective bargaining agreement." *Enterprise Wheel*, 363 U.S. at 597 (emphasis added). This "essence" test is cited by virtually every court reviewing an arbitration award. Indeed, its wording has been described as "somewhat curious but canonical." *Miller Brewing Co.* v. *Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 912 (1985).

B. Abuses Abound Under the "Essence" Test.

While the lower courts uniformly acknowledge the importance of arbitration in the scheme of federal labor law,[8] they have found the "essence" standard of judicial review difficult to apply.[9] Consequently, many accord complete deference to arbitrators' determinations, so long as the arbitrator purports to "interpret" the contract.

The decision below is symptomatic of this overly deferential posture. There, the Ninth Circuit upheld an arbitrator's decision which imposed a specific limitation on the company's power to subcontract, based on "the traditional contract principle that neither party shall do anything which will have the effect of destroying or nullifying the rights of the other party to receive the benefits of the agreement." Petition for Cert. at C-20. Quite apart from ignoring the longstanding basic management

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[8] The expeditiousness and finality of the arbitration process are believed to "defuse the chronic crises that inhere in the labor setting and thereby prevent these crises from developing into labor unrest." *Loveless* v. *Eastern Air Lines, Inc.*, 681 F.2d 1272, 1275 (11th Cir. 1982), *citing Warrior & Gulf*, 363 U.S. at 578-81.

[9] As stated in the Petition for Certiorari in *Ethyl Corp.* v. *United Steelworkers of America*, 768 F.2d 180 (7th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3311 (U.S. Oct. 16, 1985) (No. 85-670) at p. 13, "federal courts are struggling to determine how they can assure that an arbitration award "draws its essence" from the collective bargaining agreement without reviewing the merits of the award."

prerogative of running the business subject only to statutory and bargained-for restrictions,[10] the arbitrator also ignored the explicit terms of the contract, which specifically precluded him from modifying the contract, and reserved to the company *all rights* of management and direction of the business. *See* nn. 4, 5, *supra.*

In reviewing this decision, the Ninth Circuit merely recited the essence test, noted the arbitrator's "inference" that "a tacit agreement existed between the parties" on the 60%-40% subcontracting ratio, Petition for Cert. at A-7, A-8, and concluded that it "[could] not say that the arbitrator's award was not a plausible interpretation of the agreement in light of the parties' conduct." *Id.* at A-10. Thus, the court allowed the arbitrator, under the guise of "interpreting" the agreement, to impose a contractual provision which the union unsuccessfully had attempted to negotiate itself.

The essence test lends itself to such excessive deference; almost any award will contain enough of an interpretation of the contract to "draw its essence" therefrom. Other circuits have misconstrued the test as the Ninth Circuit did here. The Seventh Circuit has held that as long as an award is "based on the arbitrator's interpretation—unsound though it may be—of the contract, it draws its essence from the contract." *Ethyl Corp.*, 768 F.2d at 184. The arbitrator can be "wrong, maybe even clearly wrong; it does not show that he was doing something other than interpreting the contract." *Id.* at 185.[11] The Second Circuit has held that an arbitra-

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[10] *See Jones Dairy Farm* v. *Local No. P-1236, UFCW*, 755 F.2d 583, 584 (7th Cir.), *rev'd on other grounds on rehearing*, 760 F.2d 173 (7th Cir.), *cert. denied*, 106 S. Ct. 136 (1985) ("under existing law, in the absence of agreement to the contrary, the employer remains free to contract out if he so desires, even if the motivation for the decision is a wish to pay lower labor costs").

[11] The Seventh Circuit has repeated this holding several times. *See, e.g., Brotherhood of Locomotive Engineers* v. *Atchison, Topeka*

tion award will not be vacated if the arbitrator explains his decision "in terms that offer even a barely colorable justification for the outcome reached." *Meyers* v. *Parex, Inc.*, 689 F.2d 17, 18 (2d Cir. 1982), *quoting In re Andros Compania Maritima, S.A.*, 579 F.2d 691, 704 (2d Cir. 1978).

Enterprise Wheel thus has been interpreted to prohibit as not "drawing its essence" from the agreement only a decision in which "the arbitrator *must* have based his award on some body of thought, or feeling, or policy, or law that is outside the contract . . . ." *Ethyl Corp.*, 768 F.2d at 184-85 (emphasis in original). Such extreme judicial deference is particularly problematic where the arbitrator clearly has disregarded the language of the contract. For example, the Eleventh Circuit has held that an arbitrator was not obliged to read a contract literally, even where a literal reading would have precluded the construction he arrived at. *Loveless* v. *Eastern Air Lines, Inc.*, 681 F.2d at 1275.[12]

The Third Circuit recently upheld an arbitrator's reinstatement of an employee undisputedly dismissed for drinking during working hours. Although the contract enumerated this as a cause for immediate dismissal with-

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& Santa Fe Ry. Co., 768 F.2d 914, 922 (7th Cir. 1985) ("an arbitrator's award may be overturned *only if* the reviewing court is convinced that he was not trying to interpret the collective bargaining contract but that instead he resolved the parties' disputes according to his private notions of justice") (emphasis added); *Miller Brewing Co.* v. *Brewery Workers Local Union No. 9*, 739 F.2d at 1163 (court held that the arbitrator's award passed the "not very demanding" essence test, in that "[t]he arbitrator purported to be interpreting the language of the collective bargaining agreement").

[12] *Accord, International Brotherhood of Electrical Workers, Local Union No. 199* v. *United Telephone Co.*, 738 F.2d 1564, 1568 (11th Cir. 1984) (citing *Loveless* for the proposition that "even where an arbitrator's award is contrary to the plain, unambiguous language of the collective bargaining agreement, the award may still 'draw to its essence' from the agreement").

out warning, the arbitrator held that since the employer had not given *notice of its intent to enforce the dismissal conditions strictly*, discharge was too severe a penalty. The court found that the arbitrator's award of reinstatement and back pay was "not irrational," and drew its essence from the contract. *Super Tire Engineering Co.* v. *Teamsters Local Union No. 676*, 721 F.2d 121, 124-25 (3d Cir. 1983), *cert. denied*, 105 S. Ct. 83 (1984). The Seventh Circuit subsequently endorsed this decision, even though it found it to be "a particularly good example of deference to a highly improbable reading of the collective bargaining agreement by the arbitrator." *Ethyl Corp.*, 768 F.2d at 184.

The Eighth Circuit, sitting *en banc*, also recently affirmed enforcement of an arbitrator's award mitigating the discipline a company had imposed on employees, even though the contract specifically precluded him from ruling on the appropriateness of disciplinary measures. *Riceland Foods, Inc.* v. *United Brotherhood of Carpenters & Joiners, Local 2381*, 749 F.2d 1260 (8th Cir. 1984) (*en banc*) (equally divided court), *rev'g* 737 F.2d 758 (8th Cir. 1984) (panel opinion), *cert. denied*, 105 S. Ct. 2327 (1985). And a number of cases hold that explicit "no modification" provisions expressly restricting arbitrators' authority "do not limit to any significant degree" the arbitrator's authority. *United Telephone Co.*, 738 F.2d at 1569, *citing Holly Sugar Corp.* v. *Distillery Workers Int'l Union*, 412 F.2d 899, 904-05 (9th Cir. 1969).[13]

It is apparent from a review of these decisions that the essence standard furnishes insufficient guidance for the lower courts, and under it, they have failed to perform their function of ensuring that arbitrators do not exceed the terms of the contracts they are called upon to inter-

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[13] *See also Ethyl*, 768 F.2d at 186; *Loveless*, 681 F.2d at 1277 n.10; *United Steelworkers of America* v. *United States Gypsum Co.*, 492 F.2d 713, 730 (5th Cir.), *cert. denied*, 419 U.S. 998 (1974).

pret.[14] As one experienced arbitrator has stated, "the parties expect the arbitrator to follow the contract and to eschew the temptation to become a statesman." [15] The law requires no less.

CONCLUSION

The general principles set forth in the *Steelworkers Trilogy* have failed to provide sufficient guidance on judicial review of arbitration awards. The Court should grant this Petition in order to give substance to the "essence" test and require arbitrators to confine their interpretations to the terms the parties agreed to in the contract.

Respectfully submitted,

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[14] The severity of the problem is further illustrated by the remarks of Judge Gibson of the Eighth Circuit, in a vigorous dissent joined by three other judges in *United Electrical, Radio & Machine Workers of America, Local 1139* v. *Litton Microwave Cooking Products*, 728 F.2d 970, 974 (8th Cir. 1984) (*en banc*): "The court today does damage to established principles of the law of arbitration. The court mistakenly concludes that 'the award draws its essence from the contract' and overlooks the other important teachings of the *Steelworkers* trilogy. This case, in tandem with *Lackawana Leather Co.* v. *District Union No. 271, UFCW*, 706 F.2d 228 (8th Cir. 1983) (*en banc*), effectively eliminates any judicial review over the concededly broad powers of arbitrators."

[15] Davey, *The Supreme Court and Arbitration*; *The Musings of an Arbitrator*, 36 Notre Dame Law. 138, 140 (1961).